Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

BASE METAL TRADING, LIMITED,

Petitioner,

v.

OJSC "NOVOKUZNETSKY ALUMINUM FACTORY," ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Shaffer v. Heitner*, 433 U.S. 186 (1977), this Court held:

> Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.

Id. at 210, n. 36.

Contrary to the holding of *Shaffer*, and decisions by the Ninth Circuit and the Southern District of New York directly on point, the Court of Appeals below affirmed dismissal of an action to confirm and enforce a foreign arbitration award, pursuant to the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201, *et seq.* for lack of personal jurisdiction, despite the district court's arrest of property of the defendant-debtor within the district. Thus, the following important question is raised:

Did the lower court err in dismissing an action to confirm and enforce a foreign arbitration award pursuant to the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards when property of the debtor had been arrested in the district, in light of *Shaffer v. Heitner*, which held that it would not be unfair to allow an action to realize on a debt if property of the debtor was present in the jurisdiction?

LIST OF PARTIES

Petitioner Base Metal Trading, Ltd. is a Guernsey, Channel Islands, corporation engaged in trading associated with the aluminum industry. Respondent OOO "Novukuznetsky Aluminum Factory ("NKAZ"), is a Russian open joint stock corporation engaged in the manufacture and sale of aluminum. MG Metal & Commodity Corp. and MG Metal & Commodity Co., Ltd. (collectively "MG Metal") intervened in the action below by filing a motion to vacate an attachment order, alleging it owned the aluminum arrested in the action.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rules 14(1)(b) and 29.6, Petitioner Base Metal Trading, Ltd. makes the following disclosure:

1. Petitioner is not a publicly held corporation or other publicly held entity.

2. Petitioner has no corporate parent.

3. None of Petitioner's stock is held by a publicly traded corporation or other publicly held entity.

TABLE OF CONTENTS

Question Presented i

List of Parties ii

Corporate Disclosure Statement iii

Table of Contents iv

Table of Cited Authorities v

Table of Appendices viii

Opinions Below 1

Statement of Jurisdiction 1

Statutes and Rules 2

Statement of Case 4

Reasons for Granting the Writ 7

The Fourth Circuit's Decision Conflicts with this Court's Holding in *Shaffer V. Heitner* That the Presence of Property in a State Is Sufficient to Confer Jurisdiction to Realize on an Adjudicated Debt and a Ninth Circuit Decision Which Specifically Holds That the Presence of Property in a State Is Sufficient to Confer Jurisdiction to Confirm and Enforce a Foreign Arbitration Award under the New York Convention 7

Conclusion 16

TABLE OF CITED AUTHORITIES

CASES

Am. Constr. Mach. & Equip. Corp., Ltd. v. Mechanised Constr. of Pakistan Ltd.,
1986 U.S. Dist. LEXIS 28551, No. 85 Civ. 3765, 1986 WL 2973 (S.D.N.Y. March 5, 1986) 12

Carolina Power & Light Co. v. Uranex,
451 F. Supp. 1044 (N.D. Cal. 1977) 10

CME Media Enters. B. V. v. Zelezny,
2001 U.S. Dist. LEXIS 13888 (S.D. N.Y. 2001) 11, 12, 14, 16

Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.,
284 F.3d 1114 (9th Cir. 2002) . . . . . passim

In the matter of Fotochrome,
377 F.Supp. 26 (U.S. Bankr., S.D.N.Y. 1974) . . . 13

International Shoe v. State of Washington,
326 U.S. 310 (1945) 8, 9

O'Connor v. Lee-Hy Paving Corp.,
579 F.2d 194 (2d Cir. 1978) 11

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) 11

Shaffer v. Heitner, 433 U.S. 186 (1977) . . . . . passim

STATUTES

9 U.S.C. § 201, *et seq.* . . . . . i, 2, 3, 4, 7

9 U.S. C. § 201 2

9 U.S. C. § 203 . . . . . 2, 4

9 U.S.C. § 204 2

9 U.S. C. § 207 3

28 U.S.C. § 460 2

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 4

CONVENTIONS AND TREATIES

New York Convention on The Recognition and Enforcement of Foreign Arbitral Awards - Article III 3

RULES

Supreme Court Rule 13.1 1

Supreme Court Rule 14(1)(b) iii

Supreme Court Rule 29.6 iii

Fed. R. C. P. 4(f)(2)(A) 5

Fed. R. C. P. 4(k)(2) 6

Fed. R. C. P. 64. 4

OTHER AUTHORITIES

Lanier, Invisible Barriers in United States Law to the Recognition and Enforcement of International Commercial Arbitration Agreements and Awards: The American Law of Personal Jurisdiction in Application to Judicial Proceedings to Stay Litigation, to Compel Arbitration and to Confirm Arbitral Awards, 3 *Croat. Arbit. Yearb.* 140 (1996) 13, 14, 15

Note Developments in the Law, State-Court Jurisdiction, *73 Harv. L. Rev. 955 (1960)* 9

Restatement (Second) of Conflict of Laws §66, Comment a.I 9

Restatement (Third) of Foreign Relations Law § 487 reporter's note 7 (1987) 10

Strauss, Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments, 61 *Alb. L. Rev.* 1237 (1998) 15

Volz & Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 Wm. Mitchell L. Rev. 867 (1996) 7

TABLE OF APPENDICES

Appendix A – Opinion Of The United States Court of Appeals For The Fourth Circuit Dated And Filed March 6, 2002, Published at 283 F.3d 208 . . . . . 1a

Appendix B – Memorandum And Order Of The United States District Court For the District Of Maryland Dated June 14, 2001 . . . . . 13a

Appendix C – Order Of The United States District Court For the District Of Maryland Northern Division April 3, 2001 . . . . . 18a

Appendix D – Memorandum And Order Of The United States District Court For the District Of Maryland Dated April 3, 2001 . . . . . 20a

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Base Metal Trading, Ltd. ("Base Metal") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on March 6, 2002, which affirmed the district court's June 14, 2001 order denying Base Metal's motion for reconsideration of the district court's order of April 3, 2001 dismissing this action for lack of personal jurisdiction.

OPINIONS BELOW

The March 6, 2002 memorandum opinion of the United States Court of Appeals for the Fourth Circuit that gives rise to this Petition is reported at 283 F.3d 208. It is reprinted in Appendix A hereto ("App. A") at page 1a. The district court's judgment order dated April 3, 2001 which dismissed this case for lack of jurisdiction (the "Dismissal Order") (reproduced at App. C, 18a); memorandum and order dated April 3, 2001 (reproduced at App. D, 20a); and memorandum and order dated June 14, 2001 denying Petitioner Base Metal's motion for reconsideration of the Dismissal Order (reproduced at App. B, 13a) have not been published and are attached hereto.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254(1). The United States Court of Appeals for the Fourth Circuit issued its Decision by way of an opinion dated March 6, 2002, and judgment was entered on that date. Pursuant to Supreme Court Rule 13.1, this Petition was filed

within 90 days of the entry of the opinion and judgment, and is thus timely.

STATUTES AND RULES

The 1958 New York Convention on Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201, *et seq.*

9. U.S.C. §§ 201 - 207 provide in relevant part:

> § 201. Enforcement of Convention
>
> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter [*9 USCS §§ 201* et seq.].
>
> § 203. Jurisdiction; amount in controversy
>
> An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28 [28 U.S.C. § 460] shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.
>
> § 204. Venue
>
> An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title [9 U.S.C.S. § 203] may be brought in any such court in which save for the arbitration

agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration is such place is within the United States.

§ 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter [9 USCS §201, *et seq.*] for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferred recognition or enforcement of the award specified in the said Convention.

NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article III of the New York Convention on The Recognition and Enforcement of Foreign Arbitral Awards provides:

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.

> There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

STATEMENT OF THE CASE

In 1999, Base Metal and NKAZ submitted a dispute to the private Commercial Arbitration Court of the Moscow Chamber of Commerce and Industry, which awarded Base Metal approximately $13 million (the "award"). Subsequently, Base Metal learned that a shipment of 2,563 tons of aluminum (the "aluminum") owned by NKAZ was being shipped to Baltimore, Maryland.

On June 29, 2000, Base Metal filed a Verified Complaint to Confirm Foreign Arbitration Award, pursuant to 9 U.S.C. § 201, *et seq.* (the 1958 New York Convention on Enforcement of Foreign Arbitral Awards), in which Base Metal sought to confirm the award. Base Metal also filed a Motion under Fed.R.Civ.Pro. 64 seeking seizure or attachment of the aluminum (21a). Jurisdiction was based upon the existence of a federal question pursuant to 28 U.S.C. § 1331 and 9 U.S.C. § 203.

By order dated June 29, 2000, the Court granted the Rule 64 Motion and the aluminum was arrested (21a). Thereafter, Base Metal agreed to release the aluminum to a third party, MG Metal, which had filed a motion to vacate the attachment, so that it could be sold. Ownership of the proceeds was disputed and, if Base Metal ultimately prevails, it will have a claim over against MG Metal for the proceeds from the sale of the aluminum. Neither the June 29, 2000 arrest order, nor the

subsequent orders vacating the arrest order, are the subject of this Petition.

On August 15, 2000, Base Metal served the complaint, motion, and summons on NKAZ, pursuant to Fed.R.Civ.Pro. 4(f)(2)(A), via international express mail using DHL Worldwide Express. NKAZ failed to answer or otherwise respond within the required 90 days, and, on January 18, 2001, Base Metal sought entry of a default judgment (22a). The Clerk of Court entered default and a default judgment in the amount of $13,167,541.51 against NKAZ on January 26, 2001 (the "Default Judgment") (22a).

On February 14, 2001, NKAZ filed a motion seeking to vacate the Default Judgment, asserting that service had not been properly effected upon it, and, on April 3, 2001, the district court, without deciding the service of process issue, vacated the Default Judgment and dismissed the case *sua sponte* for lack of personal jurisdiction (the "Dismissal Order") (27a - 28a). Assuming that the aluminum was the property of NKAZ when arrested, the district court found:

> At most, the hypothetical NKAZ shipment of its metal and sale in Maryland would permit specific jurisdiction over NKAZ over a lawsuit relating to the shipment. By no stretch could the single shipment, or even several such shipments, constitute continuous and systematic contacts with Maryland so as to justify general jurisdiction over NKAZ.

(27a).

Base Metal filed a Motion for Reconsideration, on April 17, 2001, arguing: (1) that dismissal was inappropriate because NKAZ had not moved for dismissal of the claim; (2) that discovery should have been afforded on jurisdictional issues before the case was dismissed; and (3) the district court should have considered contacts between NKAZ and states other than Maryland under the terms of Fed.R.Civ.Pro. 4(k)(2).

The district court addressed only the Rule 4(k)(2) argument in its June 14, 2001 Memorandum and Order (the "Denial Order"), and denied the Motion for Reconsideration on two grounds: (1) that it was premature to make a finding that no state had jurisdiction over NKAZ while similar actions based on the arrest of aluminum were still pending in Louisiana and New Jersey (15a - 16a); and (2) that Base Metal's assertion in other actions that NKAZ was subject to jurisdiction in Louisiana and New Jersey meant that Base Metal had not and could not assert, as required by Fed.R.Civ.Pro. 4(k)(2), that NKAZ was not subject to jurisdiction anywhere in the United States (16a).

Base Metal filed a timely notice of appeal of the Denial Order on July 13, 2001. On March 6, 2002, the Court of Appeals for the Fourth Circuit affirmed the Denial Order, again assuming that the aluminum was the property of NKAZ (8a, 10a).

REASONS FOR GRANTING THE WRIT

THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S HOLDING IN *SHAFFER V. HEITNER* THAT THE PRESENCE OF PROPERTY IN A STATE IS SUFFICIENT TO CONFER JURISDICTION TO REALIZE ON AN ADJUDICATED DEBT AND A NINTH CIRCUIT DECISION WHICH SPECIFICALLY HOLDS THAT THE PRESENCE OF PROPERTY IN A STATE IS SUFFICIENT TO CONFER JURISDICTION TO CONFIRM AND ENFORCE A FOREIGN ARBITRATION AWARD UNDER THE NEW YORK CONVENTION

The issue presented in this Petition goes to the heart of international commerce: whether courts in the United States can maintain jurisdiction in a manner consistent with sister courts around the world[1], pursuant to the 1958 New York Convention on Enforcement of Foreign Arbitral Awards (the "Convention"), 9 U.S.C. § 201, *et seq.*, to enforce foreign arbitral awards when property is present in the United States.

Contrary to this Court's holding in *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Fourth Circuit held that presence of

[1] For example, the courts of England allow "direct enforcement" of foreign arbitration awards upon presentation of certified originals, insofar as they can serve as the basis for domestic collection proceedings as if they were domestic judgments. *See generally* Volz & Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 Wm. Mitchell L. Rev. 867, 871 & n.12 (1996) and sources cited therein. Most Western European nations enforce foreign arbitration awards under the Convention as if they were domestic judgments, subject to limited judicial review in summary proceedings. *Id.* at 894. Belgium allows such proceedings to occur *ex parte*. *Id.* at 895.

property was not sufficient to confer jurisdiction to confirm and enforce an arbitration award against a foreign debtor. The Fourth Circuit's decision also directly conflicts with a recent decision of the Ninth Circuit, *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002), holding that the presence of property is sufficient to confer jurisdiction to confirm and enforce an arbitration award under the Convention.

In *Shaffer*, this Court recognized that a state may assert jurisdiction over property despite the absence of "minimum contacts" with its owner, if the attachment is accomplished for purposes of providing security (or satisfaction) for a prior or pending *in personam* action against the owner elsewhere, consistent with the requirements of *International Shoe v. State of Washington*, 326 U.S. 310 (1945). Justice Marshall, who penned the majority opinion, explained that:

> Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.

Id. at 210, footnote 36.

This Court explained its reasoning as follows:

> The primary rationale for treating the presence of property as a sufficient basis for jurisdiction to adjudicate claims over which the State would not

have jurisdiction if *International Shoe* applies is that a wrongdoer

> "should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit." Restatement [(Second) of Conflict of Laws] §66, Comment a.I.
>
> Accord, [Note, Developments in the Law, State-Court Jurisdiction, *73 Harv. L. Rev. 955 (1960*] ... Moreover, we know of nothing to justify the assumption that a debtor can avoid his obligations by removing his property to a State in which his creditor cannot obtain personal jurisdiction over him.

Id. at 210.

Shortly after the Fourth Circuit rendered its decision in this matter, the Ninth Circuit reached the opposite result in *Glencore Grain* and held that, pursuant to *Shaffer*, a foreign arbitration award under the Convention is the equivalent of a judgment, so that jurisdiction to confirm such an award may be asserted based on a non-resident debtor's property in the jurisdiction. 284 F.3d at 1127. The Ninth Circuit explained:

> Glencore Grain asserts: "Proceedings to enforce a foreign arbitration award against assets located in this jurisdiction should not require the same showing of personal jurisdiction to satisfy due process as would a complaint seeking determination of the merits of the controversy, because the merits have already been determined." . . .

> Considerable authority supports Glencore Grain's position that it can enforce the award against Shivnath Rai's property in the forum even if that property has no relationship to the underlying controversy between the parties. In *Shaffer v. Heitner, 433 U.S. 186, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977)*, the Supreme Court endorsed the position urged by Glencore Grain ... *Shaffer, 433 U.S. at 210 n. 36;* see also Restatement (Third) of Foreign Relations Law § 487 reporter's note 7 (1987) ("The [] Convention does not refer to the subject, but it is clear that attachment and comparable provisional remedies for enforcement of a foreign arbitral award, if available in the enforcing state, are compatible with the Convention."); cf. *Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1049 (N.D. Cal. 1977)* (holding plaintiff may attach defendant's California property as security pending arbitration between the parties in New York).

Glencore Grain, 284 F.3d at 1127 (footnote and previously quoted language from *Shaffer* omitted). The Ninth Circuit found further support in this Court's pro-enforcement characterization of the Convention:

> The Convention and its implementing legislation have a pro-enforcement bias, a policy long-recognized by the Supreme Court:
>
> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial

> arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

Glencore Grain, 284 F.3d at 1120 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)).

A second court has relied on *Shaffer* to assert jurisdiction to confirm and enforce a foreign arbitral award based on property within the district. In *CME Media Enters. B. V. v. Zelezny*, 2001 U.S. Dist. LEXIS 13888 (S.D. N.Y. 2001), the court held, pursuant to *Shaffer*:

> A court has authority to adjudicate a case based on its power over either the defendant's person or the defendant's property. Quasi in rem jurisdiction is jurisdiction over designated property that results in a judgment affecting the interests of particular individuals in designated property. *R. F. Shaffer v. Heitner, 433 U.S. 186, 199 & n.17, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977)*. Quasi in rem jurisdiction is used primarily for two purposes: to secure a pre-existing claim in the designated property or to apply property of a defendant towards satisfaction of a judgment previously obtained against the defendant. Id. ...
>
> [Q]uasi in rem jurisdiction is used to attach property to collect a debt based on a claim already adjudicated in a forum where there was personal jurisdiction over the defendant. *Shaffer, 433 U.S. at 210 & n.36.* Cf. *O'Connor v. Lee-*

> *Hy Paving Corp., 579 F.2d 194, 198 (2d Cir. 1978).* ...

Id. at *8. The court found that due process concerns were satisfied:

> [This] Court has quasi in rem jurisdiction because respondent maintains property, specifically, the [Bank] Account, in this District. *Shaffer, 433 U.S. at 199.* Minimum contacts are not required because an arbitration panel with personal jurisdiction over Zelezny has already adjudicated CME's claims against Zelezny and determined that he is a debtor of CME; the purpose of the instant proceeding is to collect on that debt. See *id. at 210 n.36;* see also *Am. Constr. Mach. & Equip. Corp., Ltd. v. Mechanised Constr. of Pakistan Ltd., 1986 U.S. Dist. LEXIS 28551, No. 85 Civ. 3765, 1986 WL 2973,* at *5 (S.D.N.Y. March 5, 1986) (dicta, discussing *Shaffer* note 36).

Id. at *9 - 10. The court reviewed Justice Marshall's thorough analysis in *Shaffer* of the policies underlying *in rem* and *quasi in rem* jurisdiction and held, that: "[u]nder this reasoning, minimal contacts are not required for a court to exercise jurisdiction over assets to permit a party to collect on an arbitration award." *Zelezny*, 2001 U.S. District. LEXIS 13888 at *10.

In contrast, the Maryland district court and the Fourth Circuit did not appreciate the meaning of *Shaffer* and treated this matter as one requiring Base Metal to establish general jurisdiction over NKAZ. The court below incorrectly concluded that:

> [D]ue process requires Base Metal to establish that NKAZ's contacts with Maryland are "continuous and systematic" ... Yet, sufficient minimum contacts are simply not present in this case.
>
> Base Metal focuses on one shipment of aluminum to Maryland as a basis for jurisdiction .... Even assuming, however, that the aluminum did belong to NKAZ, this single shipment does not amount to "continuous and systematic" contacts.

(8a - 9a). As a result, Base Metal was put out of court.

Strong public policies support the exercise of jurisdiction to confirm and enforce foreign arbitral awards pursuant to the Convention when the debtor has property in the jurisdiction. As evidenced by the Act's legislative history, the underlying purpose of the Convention is to facilitate and encourage arbitration of international business disputes. The Convention provides for reciprocal recognition of arbitration awards among nations because: "[i]nternational trade is so important to our economy and to peace and welfare of the world". *In the matter of Fotochrome*, 377 F.Supp. 26, 32 (U.S. Bankr., S.D.N.Y. 1974) (citations omitted); *see also Glencore Grain*, 384 F.3d at 1120. International businesses provide for arbitration, rather than litigation, of commercial disputes because of concerns regarding costs and the fairness of proceedings in a foreign defendant's home jurisdiction. The Convention is intended to encourage and facilitate international arbitration and further America's trade interests. *See generally* Lanier, Invisible Barriers in United States Law to the Recognition and Enforcement of International Commercial Arbitration Agreements and Awards: The American Law of Personal Jurisdiction in Application to Judicial

Proceedings to Stay Litigation, to Compel Arbitration and to Confirm Arbitral Awards, 3 *Croat. Arbit. Yearb.* 140 (1996) (hereafter Lanier).

As noted by Lanier:

> The international community most concerned with the development of world trade and economic development has, over the course of the past four decades, done much to develop an interlocking, integrated and cohesive body of truly transnational principles in support of the effectiveness of international commercial arbitration as the method of choice in the resolution of international trade and commercial disputes.

Lanier, 3 *Croat. Arbit. Yearb.* at 155.

It would undermine the purposes of the Convention to prohibit confirmation of arbitration awards in jurisdictions where enforcement can be effected based on the presence of the foreign debtor's property. Allowing *quasi in rem* jurisdiction to be swallowed by the "minimum contacts" test, in the manner of the Fourth Circuit, would violate Justice Marshall's admonition that *Shaffer* should not be interpreted "to justify the assumption that a debtor can avoid paying his obligations by removing his property to a State in which his creditor cannot obtain personal jurisdiction over him." *Shaffer*, 326 U.S. at 210; *Zelezny,* 2001 U.S. Dist. LEXIS 13888 at *10. Debtors could evade enforcement efforts by creditors with valid arbitration awards and, presumably, foreign judgments, by transferring their property to states with which they have few or no contacts. In the worst case, the United States could become a safe haven for sophisticated foreign debtors seeking to defraud their creditors.

Indeed, commentators have expressed fears that the United States is unable to fully support and abide by the requirements of the Convention because of the stringent application of "minimum contacts" jurisprudence. Lanier observes that:

> it is now time in the growing elaboration and maturation of the body of international and transnational principles which stand in support of international commercial arbitration and a reasoned, orderly, and rational system of international dispute settlement, to turn global attention to ... the lingering limitations of our internal legal orders which bear on the efficiency, effectiveness, and economy of international commercial arbitration. ... [T]he role of personal jurisdiction doctrine in American law as it bears on the recognition and enforcement of international commercial agreements and awards is offered as a modest beginning in that process ....

Id. at 155-56; *cf.* Strauss, Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments, 61 *Alb. L. Rev.* 1237, 1238 (1998) (recommending adoption of the proposed Hague Convention as a means of overcoming barriers to the satisfaction of foreign judgments caused by unique doctrines of American jurisdictional jurisprudence).

Confirmation of the proper reading of *Shaffer* by this Court will resolve a conflict between Circuits and encourage American courts to confirm and enforce awards obtained by foreign creditors in the manner of the *Glencore Grain* and

Zelezny decisions. This, in turn, will promote reciprocal exercises of jurisdiction by foreign courts to confirm and enforce awards obtained by American entities and thus further the interests of the United States, as reflected by its execution of the Convention. And, it will avoid the injustice of Base Metal being unable to satisfy its award, even though it diligently identified property of its former Russian trading partner in the United States.

CONCLUSION

For the foregoing reasons this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1916

[Filed March 6, 2002]

BASE METAL TRADING, LIMITED, Plaintiff-Appellant,	)
v.	)
OJSC "NOVOKUZNETSKY ALUMINUM FACTORY," Defendant-Appellee,	)
MG METAL AND COMMODITY CORPORATION; MG METAL AND COMMODITY COMPANY, LIMITED, Movants.	)

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Marvin J. Garbis, District Judge
(CA-00-1973-MJG)

JUDGES:
Before WILKINSON, Chief Judge, and WILKINS and GREGORY, Circuit Judges. Chief Judge Wilkinson wrote the

opinion, in which Judge Wilkins and Judge Gregory joined.

OPINION

Plaintiff Base Metal Trading, Inc. ("Base Metal"), a Guernsey, Channel Island corporation brought the present action to confirm a foreign arbitration award against Defendant OJSC "Novokuznetsky Aluminum Factory" ("NKAZ"), a Russian corporation. The district court dismissed the case for lack of personal jurisdiction over NKAZ. Because the mere presence of seized property in Maryland provides no basis for asserting jurisdiction when there is no relationship between the property and the action, we affirm.

I.

From 1995 to 1999, plaintiff Base Metal, a Guernsey, Channel Islands corporation engaged in trading in raw materials associated with the aluminum industry, had various business dealings with defendant NKAZ, a Russian corporation engaged in the manufacture and sale of aluminum. A dispute arose between the two parties and in 1999, they agreed to arbitrate the dispute in the private Commercial Arbitration Court of the Moscow Chamber of Commerce and Industry. On December 10, 1999, the Commercial Arbitration Court issued an arbitration award in favor of Base Metal in the amount of approximately $12,000,000. However, Base Metal was unable to collect the award at that time.

On June 29, 2000, Base Metal filed a Verified Complaint to Confirm a Foreign Arbitration Award in

Maryland district court, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), implemented by 9 U.S.C. §§ 201 *et seq*. On that same day, Base Metal filed a motion seeking seizure or attachment of an aluminum shipment alleged to belong to NKAZ that had arrived in Baltimore Harbor on June 28. *See* Fed. R. Civ. P. 64. The attachment motion was granted by the district court and the property was taken into custody by the U.S. Marshal. Shortly thereafter, MG Metal & Commodity Corp. and MG Metal & Commodity Co., Ltd. (collectively "MG") claimed ownership of the seized aluminum and moved to vacate the attachment. On July 7, 2000, the district court issued an order vacating the attachment, giving custody and control over the aluminum to MG, and providing for the placement into an escrow account of any funds derived from the sale of the aluminum.[1]

On September 7, 2000, Base Metal filed an affidavit stating that on August 15, 2000, a copy of the summons and complaint was sent to NKAZ. However, NKAZ did not respond.[2] On January 18, 2001, Base Metal moved for a default judgment against NKAZ. The district court granted the motion and entered a default judgment against NKAZ in the amount of $13,767,541.51. Upon learning of the default

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[1] Ultimately, Base Metal declined to pursue any claim against MG in the district court, so the present action involves only Base Metal and NKAZ.

[2] NKAZ also alleged that service was not proper. The district court, however, determined that the validity of the service was not necessary to its ruling.

judgment, NKAZ moved to vacate it and to have the case dismissed for, *inter alia*, lack of personal jurisdiction.

On April 3, 2001, the district court dismissed the case for lack of jurisdiction. The court noted that NKAZ's contacts with Maryland related exclusively to the fact that aluminum manufactured by NKAZ in Russia was unloaded in Baltimore Harbor. And the court held that, "By no stretch could the single shipment, or even several such shipments, constitute continuous and systematic contacts with Maryland so as to justify general jurisdiction over NKAZ."

Base Metal filed a motion for reconsideration seeking to have the court exercise jurisdiction pursuant to Rule 4(k)(2) of the Federal Rules of Civil Procedure which provides that a district court may exercise jurisdiction over a defendant if: (1) the plaintiff's claim "arises under federal law;" (2) the defendant "is not subject to the jurisdiction of the courts of general jurisdiction of any state;" and (3) the court's exercise of jurisdiction "is consistent with the Constitution and laws of the United States." Fed. R. Civ. P. 4(k)(2). The court determined that in order to exercise jurisdiction under Rule 4(k)(2) it had to find that no other state court had jurisdiction over NKAZ. And in light of cases pending in other courts in which Base Metal was arguing strenuously that NKAZ had sufficient contacts to warrant the exercise of personal jurisdiction, such a finding would be difficult and would usurp "the opportunity for sister federal courts to exercise jurisdiction which they may decide they have." Therefore, the court declined to apply Rule 4(k)(2). Base Metal appeals.

II.

Base Metal argues that the presence of NKAZ's property in Maryland confers jurisdiction over NKAZ for the purpose of confirming and enforcing the foreign arbitration award.

A.

As a preliminary matter, the Convention and its implementing legislation, 9 U.S.C. §§ 201 *et seq.*, give federal district courts original jurisdiction over actions to compel or confirm foreign arbitration awards. *See* 9 U.S.C. §§ 203, 207. However, while the Convention confers subject matter jurisdiction over actions brought pursuant to the Convention, it does not confer personal jurisdiction when it would not otherwise exist. In other words, a plaintiff still must demonstrate that personal jurisdiction is proper under the Constitution. *See Transatl. Bulk Shipping, Ltd. v. Saudi Chartering S.A.*, 622 F. Supp. 25, 27 (S.D.N.Y. 1985).

The personal jurisdiction inquiry is a well-established one. Determining whether jurisdiction is proper is normally a two-step process: (1) determining if the state's long-arm statute confers jurisdiction and (2) whether the exercise of jurisdiction, if authorized, is consistent with the Due Process requirements of the Fourteenth Amendment. Since Maryland's long-arm statute expands the exercise of personal jurisdiction to the limits allowed by the Due Process Clause, the two-step analysis merges in this case and the question is simply whether the exercise of personal jurisdiction would be consistent with due process. *See Ellicott Mach. Corp. v. John Holland Party Ltd.*, 995 F.2d 474, 477 (4th Cir. 1993);

Yangming Marine Transp. Co. v. Revon Prods. U.S.A, Inc., 311 Md. 496, 536 A.2d 633, 636 (Md. 1988). Due process requires only that a defendant "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 61 S. Ct. 339 (1940)). For these minimum contacts to exist, there must "be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-76, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985).

In examining whether the exercise of jurisdiction is reasonable, a distinction is made between specific and general jurisdiction. When the cause of action arises out of the defendant's contacts with the forum, a court may seek to exercise specific jurisdiction. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984). However, when the cause of action does not arise out of the defendant's contacts with the forum, general jurisdiction may be exercised upon a showing that the defendant's contacts are of a "continuous and systematic" nature. *Id.* at 416; *see also Goodyear Tire & Rubber Co. v. Ruby*, 312 Md. 413, 540 A.2d 482, 486-87 (Md. 1988).

This basic analysis is not altered when the defendant's property is found in the forum state. The Supreme Court's

decision in *Shaffer v. Heitner*, 433 U.S. 186, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977), eliminated all doubt that the minimum contacts standard in *International Shoe* governs *in rem* and *quasi in rem* actions as well as *in personam* actions. *Shaffer*, 433 U.S. at 207-12. The Court held that "in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising jurisdiction over the interests of persons in a thing." *Id.* at 207 (internal quotations omitted). And "the standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in *International Shoe*." *Id.*

Of course, the presence of property in a state may have an impact on the personal jurisdiction inquiry. Indeed, "when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction." *Id.* Yet, when the property which serves as the basis for jurisdiction is completely unrelated to the plaintiff's cause of action, the presence of property alone will not support jurisdiction. 433 U.S. at 209. While, "the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation," when those "other ties" do not exist, jurisdiction is not reasonable. *Id.*

Overall, courts "must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief" when determining whether the exercise of jurisdiction is reasonable in any given case. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113, 94

L. Ed. 2d 92, 107 S. Ct. 1026 (1987). And "the unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." 480 U.S. at 114. But, "when minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." *Id.* We must, therefore, examine whether Base Metal has alleged significant minimum contacts between NKAZ and Maryland to justify the exercise of jurisdiction on the Russian corporation in this case.

B.

Base Metal contends that Maryland has jurisdiction to confirm the foreign arbitration award in large part because 2,563 tons of aluminum, alleged to be the property of NKAZ, arrived in Baltimore Harbor. Because Base Metal does not contend that this action arises out of NKAZ's alleged contacts with Maryland, there is no assertion of specific jurisdiction. Base Metal only alleges that the district court has general jurisdiction over NKAZ. Therefore, due process requires Base Metal to establish that NKAZ's contacts with Maryland are "continuous and systematic." *See Helicopteros*, 466 U.S. at 416. Yet, sufficient minimum contacts are simply not present in this case.

Base Metal focuses on one shipment of aluminum to Maryland as a basis for jurisdiction, but it is not clear that the aluminum in question belonged to NKAZ. Even assuming, however, that the aluminum did belong to NKAZ, this single shipment does not amount to "continuous and systematic"

contacts. There is no dispute that the aluminum bears no relationship to the arbitration award Base Metal seeks to confirm. And Base Metal has failed to show that NKAZ has "purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson*, 357 U.S. at 253.

Indeed, the evidence fails to demonstrate NKAZ even attempted to do business in Maryland at all. NKAZ is a Russian corporation with its principal place of business in Novokuznetsk, Kemerevo Oblast, Russia. The evidence shows that NKAZ's business consists entirely of manufacturing aluminum in its Russian plant and it does not maintain an office of any kind outside of Russia. NKAZ does not contract directly with American companies or purchasers. It has no sales force or other agents in the United States. NKAZ has no subsidiaries, affiliates or shareholders in Maryland. Nor has it ever been authorized to do business in Maryland, transacted or solicited business in Maryland, or designated an agent to accept service of process in Maryland. NKAZ also neither owns nor rents any property in Maryland, has never conducted a financial transaction in Maryland, and has no assets of any kind in Maryland.

The mere fact that metal NKAZ manufactured in Russia was shipped to the United States does not amount to significant contacts with Maryland. Nor do vague references to possible contacts with New Jersey, "negotiations" with Kaiser Aluminum Company, "negotiations" in 1997 and 1998 in Pittsburgh concerning a possible joint venture with Alcoa, purchases of secondary aluminum from the United States in 1994 and 1995, other vague allegations of "negotiations" in the United States in 1998, and the attendance of NKAZ

representatives at trade conferences in the United States amount to systematic contacts with the United States, much less Maryland. Base Metal simply cannot support jurisdiction in Maryland by making vague, unsubstantiated claims based on the affidavit of a former NKAZ employee. Without establishing the minimum contacts required by *International Shoe* and *Shaffer*, the burdens the exercise of jurisdiction would place on NKAZ simply cannot be justified.

Furthermore, Base Metal has failed to demonstrate what, if any, interest Maryland has in the resolution of this dispute. NKAZ is not a Maryland corporation and does no business in Maryland. The dispute that led to the arbitration award has nothing to do with the United States or Maryland. And even more telling, Base Metal itself is not a Maryland corporation, nor is its principal place of business in Maryland or even in the United States. The fact that the plaintiff in this case is not a Maryland corporation or resident "considerably diminishes" Maryland's interest in the dispute. *Asahi Metal Industry Co.*, 480 U.S. at 114. While it is true that there is a general public policy interest in encouraging and enforcing arbitration agreements, that interest is not paramount to the interests protected by the Due Process Clause.

III.

As a final attempt to assert jurisdiction, Base Metal argues that jurisdiction is proper under Rule 4(k)(2) of the Federal Rules of Civil Procedure. Rule 4(k)(2) allows a federal court to assert jurisdiction in cases "arising under federal law" when the defendant is not subject to personal jurisdiction in any state court, but has contacts with the United States as a whole. A plaintiff who seeks to invoke

Rule 4(k)(2) as a basis for jurisdiction must show that (1) the claim "arises under federal law;" (2) the defendant is "not subject to the jurisdiction of the courts of general jurisdiction of any state;" and (3) the court's exercise of jurisdiction would be "consistent with the Constitution and laws of the United States." Fed. R. Civ. P. 4(k)(2).

Thus, for jurisdiction over NKAZ to be proper under Rule 4(k)(2), Base Metal must demonstrate that NKAZ is not subject to personal jurisdiction in any state and that NKAZ's contacts with the United States as a whole support the exercise of jurisdiction consistent with the Constitution and laws of the United States. *See United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 41, 45 (1st Cir. 1999); Fed. R. Civ. P. 4(k)(2) advisory committee note. This Base Metal has failed to do. Base Metal has never attempted to argue that NKAZ is not subject to personal jurisdiction in any state. In fact, Base Metal continues to assert that personal jurisdiction over NKAZ is proper in Maryland as well as in other states. While, as the district court noted, "it is generally permissible for a litigant to present inconsistent alternate positions in a case," the problem here is that to determine that another state lacks jurisdiction would require us to decide a question currently pending before at least one of our sister circuits.

Even assuming that Base Metal could successfully argue that NKAZ is not subject to personal jurisdiction in any state, Base Metal has failed to proffer any evidence to demonstrate that NKAZ has sufficient contacts with the United States as a whole to justify general personal jurisdiction. Even when the allegations and declarations before the district court are credited, the contacts relied upon by Base Metal are insufficient. Base Metal's declarations and

allegations are simply unsubstantiated statements asserting that NKAZ is a major aluminum producer in Russia and has "extensive business contacts inside Russia as well as around the world including in the United States." Base Metal offers no concrete evidence of what these business transactions are. As we have explained, NKAZ's alleged contacts with the United States appear sparse and limited to a few shipments of aluminum arriving in American ports. It is not clear why the limited resources of the federal courts should be spent resolving disputes between two foreign corporations with little or no connection to our country. And the burdens of subjecting a foreign company to suit in this country in this case are not justified. Therefore, a finding of jurisdiction in this case would turn the notion of "fair play and substantial justice" on its head.[3]

IV.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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[3] Base Metal also contends that the district court abused its discretion by failing to permit jurisdictional discovery. However, the decision of whether or not to permit jurisdictional discovery is a matter committed to the sound discretion of the district court. *See, e.g., Cent. States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 946 (7th Cir. 2000); *Erdmann v. Preferred Research, Inc.*, 852 F.2d 788, 792 (4th Cir. 1988). And where, as here, the plaintiff simply wants to conduct a fishing expedition in the hopes of discovering some basis of jurisdiction, we see no reason to overturn the district court's exercise of discretion.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. MJG-00-1973

[Filed June 14, 2001]

BASE METAL TRADING, LTD, Plaintiff	)
v.	)
OJSC "NOVOKUZNETSKY ALUMINUM FACTORY," Defendant	)

MEMORANDUM AND ORDER

The Court has before it Plaintiff's Motion for Reconsideration and the materials submitted by the Plaintiff relating thereto. The Court finds that it is not necessary to hold a hearing to resolve the motion.

By its Memorandum and Order of April 3, 2001, the Court held that it lacked personal jurisdiction over Defendant OJSC "Novokuznetsky Aluminum Factory" ("NKAZ") and dismissed the case for lack of jurisdiction. By the instant motion, Plaintiff seeks to have this Court change its decision in reliance upon Federal Rule of Civil Procedure 4(k) (2) of

the Federal Rules of Civil Procedure. The said Rule provides that a district court may exercise jurisdiction over a defendant if:

1. The Plaintiff's claim arises under federal law,

2. The Defendant is beyond the reach of any state court of general jurisdiction, and

3. The Court's exercise of jurisdiction would not offend the Constitution or other federal law.

As stated by Judge Ramsey of this Court in *Weyerhaeuser Corp. v. Koppers Co., Inc.:*

> A motion for reconsideration (or, to alter or amend judgment) made pursuant to Fed. R. Civ. P. 59 (e) may be made for one of three reasons: (1) an intervening change in the controlling law has occurred, (2) evidence not previously available has become available, or (3) it is necessary to correct a clear error of law or prevent manifest injustice.

771 F. Supp. 1406, 1419 (D. Md. 1991) (citation omitted). Such a motion "cannot be used to raise arguments which could, and should, have been made before [the determination to be reconsidered] issued." *Fed. Deposit Ins. Corp. v. Meyer*, 781 F. 2d 1260, 1268 (7th Cir. 1986) (citation omitted).

Here, the threshold issue is whether Plaintiff may present its Rule 4 (k) (2) contention for the first time on reconsideration. Plaintiff argues that it may present its contention because it was not on express notice that the Court was considering dismissal for lack of personal jurisdiction. The Court will assume, without deciding, that Plaintiff may present this argument.

There is an insurmountable obstacle to *this* Court's application of Rule 4 (k) (2) in the instant case. The Court expressly refers to "*this* Court" because it may be possible for another court to consider applying the Rule. The problem is that Plaintiff is, so far as the record reflects, still contending in other cases that the District of New Jersey (considering New Jersey jurisdiction) and the Eastern District of Louisiana (considering Louisiana jurisdiction) can exercise personal jurisdiction over NKAZ.

The problem is not caused by the inherent inconsistency of the position that NKAZ is subject to personal jurisdiction in Maryland, New Jersey and/or Louisiana on the one hand and the position that it is not for Rule 4 (k) (2) purposes. After all, it is generally permissible for a litigant to present inconsistent alternate positions in a case. The difficulty here is that *this* Court must find the absence of Maryland, New Jersey and Louisiana jurisdiction in order to apply Rule 4 (k) (2). Insofar as Maryland is concerned, the alternative positions cause no problem because, in this very case, the issue of Maryland jurisdiction will definitively be determined. However, in regard to New Jersey and Louisiana jurisdiction, this Court would be deciding questions pending before two sister federal courts. Should this Court decide that

there is no New Jersey or Louisiana jurisdiction, and apply Rule 4 (k) (2), it would be usurping the opportunity for sister federal courts to exercise jurisdiction which they may decide they have. Should this Court decide that there is New Jersey and/or Louisiana jurisdiction and not apply Rule 4 (k) (2), the decision would, certainly, not bind the District of New Jersey and the Eastern District of Louisiana. Hence, those courts could decide differently from the District of Maryland and decline to exercise personal jurisdiction over NKAZ.

This Court finds it to be most sound for a plaintiff seeking application of Rule 4 (k) (2), definitively to plead, and establish, that a defendant is beyond the jurisdictional reach of any state court. The Plaintiff here has not, and cannot, meet this standard. Accordingly, this Court will not apply Rule 4 (k) (2).

Finally, the Court will observe that another court may have the opportunity to consider the application of Rule 4 (k) (2). For example, the matter may well be appropriate for consideration by the District of New Jersey[1] should Plaintiff either (1) concede there that neither Maryland nor Louisiana can exercise jurisdiction over NKAZ or (2) present the New Jersey court with decisions of the federal courts in Maryland and Louisiana so holding. Indeed, with the instant decision, Plaintiff has half of what it needs in this regard.

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[1] To the extent pertinent, it appears that New Jersey may be the state with which NKAZ has had the most contacts.

For the foregoing reasons:

1. Plaintiff's Motion for Reconsider is DENIED.

2. The Judgment Order issued by this Court on April 3, 2001 remains in effect.

SO ORDERED this 14th day of June, 2001.

/s/ _____
Marvin J. Garbis
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. MJG-00-1973

[Filed April 3, 2001]

BASE METAL TRADING, LTD, Plaintiff	)
v.	)
OJSC "NOVOKUZNETSKY ALUMINUM FACTORY," Defendant	)

JUDGMENT ORDER

By separate Order issued this date, the Court has decided to dismiss this case for lack of jurisdiction.

Accordingly:

1. Judgment shall be, and hereby is, entered in favor of Defendant OJSC "Novokuznetsky Aluminum Factory" against Plaintiff Base Metal Trading, Ltd. dismissing all claims due to a lack of personal jurisdiction with costs.

2. Any and all prior rulings disposing of any claims against any parties are incorporated by reference herein.

3. This Order shall be deemed to be a final judgment within the meaning of Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED this 3rd day of April, 2001

/s/ _____
Marvin J. Garbis
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. MJG-00-1973

[Filed April 3, 2001]

BASE METAL TRADING, LTD, Plaintiff	)
v.	)
OJSC "NOVOKUZNETSKY ALUMINUM FACTORY," Defendant	)

MEMORANDUM AND ORDER

The Court had before it the Motion to Vacate Default Judgment filed by Defendant, OJSC "Novokuznetsky Aluminum Factory" ("NKAZ"), and the materials submitted relating thereto. The Court finds that a hearing is unnecessary.

I. BACKGROUND

During the years 1995 through 1999, Plaintiff, Base Metal Trading, Inc. ("Base Metal"), a metal dealer, and Defendant, NKAZ, a Russian corporate aluminum producer,

had various business dealings. A dispute arose which ended up with the December 10, 1999 issuance of a Russian arbitration award in favor of BMT and against NKAZ in the amount of approximately $12,000,000. Base Metal brought this action to confirm the foreign arbitration amount and, thus, for a Judgment against NKAZ for the amount of this award plus interest and expenses. This action was filed in the District of Maryland because a shipment of aluminum, alleged to be the property of NKAZ, was found in Maryland.

On or about June 28, 2000, a foreign vessel, M/V SALVADOR, carrying some 2,563 metric tons of aluminum docked in the Port of Baltimore. On June 29, 2000, Plaintiff, Base Metal, filed a Motion under Rule 64 of the Federal Rules of Civil Procedure seeking seizure or attachment of the aluminum that was alleged to be the property of Defendant NKAZ. The motion was granted and the property was taken into custody by the U.S. Marshal. Shortly thereafter, MG Metal & Commodity Corp. and MG Metal & Commodity Co., Ltd. (collectively "MG") claimed ownership of the seized aluminum and moved to vacate the attachment. On July 7, 2000, the Court issued an Order vacating the attachment, giving MG custody and control of the aluminum, and providing for the placement into an escrow account of any funds derived from the sale of the aluminum. Thereafter, MG agreed to subject itself to the jurisdiction of this Court to the extent of the value of the seized metal and presented proof of financial condition making the escrow arrangement unnecessary. Hence, the escrow Order was vacated and, ultimately, Base Metal declined to pursue any claim against MG in this Court. Accordingly, the instant case now involves only Base Metal's claim against NKAZ.

On September 7, 2000, Base Metal filed an Affidavit of Service by its then counsel stating that on August 15, 2000, he had sent copies of the Summons and Complaint to NKAZ's factory by DHL Express Mail Courier, signature required. The attached Airwaybill reflected that the parcel had been addressed to NKAZ, "attention Sergei Chermnsko" and stated thereon "Delivered 8/21/00 at 11:50 a.m. Signed for by SERGEEVA." The Airwaybill did not have the "Sergeeva" signature on it.

NKAZ did not respond to the Summons and Complaint. On January 18, 2001, Base Metal moved for a default judgment against NKAZ. On January 26, 2001, this Court granted the motion and entered a default judgment against NKAZ in the amount of $13,767,541.51.

On February 14, 2001, NKAZ filed the instant Motion to Vacate Default. NKAZ seeks to have the Default Judgment vacated and the case dismissed because:

1. Base Metal has failed to effect proper service process, and

2. NKAZ is not subject to personal jurisdiction in this Court.

II. SERVICE OF PROCESS

NKAZ has raised serious questions regarding the validity of Base Metal's purported service of process. An adequate discussion of the service of process issues would require a lengthy, and in part complex, discussion. There are

"interesting" questions presented, such as the current status of the "Moscow Agreement [on service of process]" between the United States and the Soviet Union, various propositions of Russian law, the effect of the statement on an Airwaybill "signed for by SERGEEVA [block letters and not a signature]" when the parcel was sent to the attention of one Sergei Chermnsko etc. Nevertheless, the Court finds it unnecessary to discuss these service issues because the validity *vel non* of the purported service of process is immaterial.

In view of Base Metal's obvious good faith attempt to effect service, the Court would not dismiss the case were service held invalid, but would vacate the Default Judgment giving Base Metal another chance. On the other hand, were service held adequate, in view of the obvious existence of serious questions as to the validity of service and the relatively prompt action by NKAZ, the Court would vacate the Default Judgment giving NKAZ a chance to defend the case on the merits.

Accordingly, by virtue of the service of process issues, the Court will vacate the Default Judgment. It is now necessary to determine whether, in light of the jurisdictional issue, the case should be dismissed.

III. PERSONAL JURISDICTION

As discussed above, the Court will vacate the Default Judgment by virtue of the existence of serious issues as to the validity of service of process. It is, therefore, necessary to

determine whether the Court does, or may, have personal *jurisdiction over Defendant NKAZ.*

A. Legal Principles

The Court's determination of the exercise of personal jurisdiction over Defendant is a two-step process. First, the Court must determine whether the state's long-arm statute authorizes jurisdiction.[1] Second, the Court must determine whether the exercise of jurisdiction, if authorized by the statute, is consistent with the due process requirements of the Fourteenth Amendment. *See Mohamed v. Michael*, 279 Md. 653, 657 (1977). The Court must look to Maryland law to determine whether the long-arm statute confers jurisdiction and to federal law to determine whether the exercise of personal jurisdiction violates the Due Process Clause of the Fourteenth Amendment. *See Snyder v. Hampton Indus., Inc.*,

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[1] Maryland's long-arm statute provides, in pertinent part:

(b) In general – A court may exercise personal jurisdiction over a person, who directly or by an agent:

(4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the state;

. . . .

Md. Code Ann. Cts. & Jud. Proc. § 6-103 (1991).

521 F. Supp. 130, 135 (D. Md. 1981), *aff'd*, 758 F. 2d 649 (4th Cir. 1993). The normal two-step analysis merges into one and thus, this Court must examine whether the exercise of personal jurisdiction is consistent with due process. *See Ellicott Mach. Corp.*, 995 F. 2d at 477.

In order for the Court properly to exercise personal jurisdiction, the defendant must have certain minimum contacts with Maryland such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). (Internal quotations omitted). For these minimum contacts to exist, there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). *See also Hanson v. Denckla*, 357 U.S. 235, 1259 (1958). In light of such contracts the court must consider factors such as the burden on the defendant, the plaintiff's interest in obtaining convenient and effective relief, the plaintiff's interest in obtaining convenient and effective relief, the forum state's interest adjudicating the dispute, and the interstate judicial system's interest in obtaining efficient resolution of controversies. *See Burger King Corp.*, 471 U.S. at 476-77.

A distinction must be drawn between specific jurisdiction and general jurisdiction. *See, e.g., Bass v. Energy Transp. Corp.*, 787 F. Supp. 530, 534 (D. Md. 1992). When a court seeks to exercise specific jurisdiction, the cause of action must arise out of defendant's minimum contacts with the forum. *See Helicopteros Nacionales de Colombia, S.A. v.*

Hall, 466 U.S. 408, 414 (1984). When the cause of action is unrelated to the defendant's contacts with the forum state, the court may exercise general jurisdiction upon a showing that the defendant's contacts are of a continuous and systematic nature. *See id.* at 416. The general jurisdiction threshold is higher than that required for specific jurisdiction. Under principles of general jurisdiction established pursuant to Maryland law, a defendant's contacts with Maryland "must be sufficiently extensive, continuous, and systematic in order to satisfy Maryland's (b) (4) statutory requirements of 'overall fairness.'" *Bass*, 787 F. Supp. at 535 (quoting *Goodyear Tire & Rubber Co. v. Ruby*, 540 A. 2d 482 (1988)). *See, e.g., Rossetti v. Esselte-Pendeflex*, 683 F. Supp. 532, 534 (D. Md. 1988) ("When jurisdiction is asserted over a claim which does not arise out of a defendant's contacts with the forum state, the defendant's contacts with that forum must be 'fairly extensive.'") (quoting *Wolf v. Richmond County Hosp. Auth.*, 745 F. 2d 904, 909 (4th Cir. 1984)). The court must examine the quality and nature of the defendant's activity in the forum state. The defendant must act in such a way that it "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Poole & Kent Co. v. Equilease Assocs. I*, 523 A. 2d 1018, 1024 (Md. Ct. Spec. App. 1987) (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). The Fourth Circuit has commented that "[b]ecause specific jurisdiction has expanded tremendously, . . . [and] plaintiffs now may generally bring their claims in the forum in which they arose [,] . . . broad constructions of general jurisdiction should be generally disfavored." *Nichols v. G.D. Searle & Co.*, 991 F. 2d 1195, 1200 (4th Cir. 1993) (citations omitted).

B. Discussion

NKAZ's contacts with, and relation to, the State of Maryland stems from the fact that on or about June 28, 2000 some 2,563 metric tons of aluminum manufactured in Russia by NKAZ was unloaded in Baltimore Harbor. NKAZ is a Russian corporation with its principal place of business there and having no connection with Maryland.[2] Assuming, contrary to the apparent facts[3], that on June 28, 2000 the metal in Baltimore Harbor was owned by NKAZ and sold in Maryland by NKAZ, there would still be no adequate jurisdictional nexus.

At most, the hypothetical NKAZ shipment of its metal and sale in Maryland would permit specific jurisdiction over NKAZ over a lawsuit relating to the shipment. By no stretch could the single shipment, or even several such shipments, constitute continuous and systematic contacts with Maryland so as to justify general jurisdiction over NKAZ.

Base Metal seeks to engage in discovery regarding the transaction involving NKAZ manufactured aluminum. The Court finds such discovery unwarranted. As discussed above, even if the transaction at issue were characterized as Base

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[2] If, as Base Metal contends, NKAZ had significant contacts with New Jersey, this "fact" would not establish any material contact with Maryland.

[3] If the metal had been owned by NKAZ and not MG, Base Metal would have had a potential claim against MG. Yet, Base Metal has declined to assert any such claim.

Metal wishes, there would not be a basis to exercise general personal jurisdiction over NKAZ. The subject matter of the instant lawsuit has nothing to do with any shipment into Maryland or any connection with Maryland. Accordingly, this case shall be dismissed for lack of personal jurisdiction over the Defendant.

IV. CONCLUSION

For the foregoing reasons:

1. The Motion to Vacate Default Judgment is GRANTED.

2. The Order Granting Default Judgment issued January 25, 2001 has been VACATED by separate Order.

3. Judgment shall be entered by separate Order.

SO ORDERED this 3rd day of April, 2001.

/s/ _____
Marvin J. Garbis
United States District Judge

Supreme Court, U.S.
FILED
JUL 10 2002
CLERK

No. 01-1796

IN THE

Supreme Court of the United States

BASE METAL TRADING, LIMITED,
Petitioner,

v.

OJSC "NOVOKUZNETSKY ALUMINUM FACTORY," *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the Fourth Circuit's holding that a foreign plaintiff seeking to confirm a foreign arbitration award against a foreign defendant must show that the defendant has sufficient minimum contacts with the United States to support *in personam* jurisdiction, and cannot base jurisdiction on the attachment of property allegedly belonging to the defendant that was in transit to a customer in the United States, where:

- the Fourth Circuit's decision is consistent with this Court's holding in *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), that the exercise of jurisdiction must, in all cases, satisfy the "minimum contacts" test;
- there is no conflict with a decision of any other circuit;
- the plaintiff never raised its novel theory of jurisdiction in the District Court;
- the property had been released by the District Court, thus eliminating any conceivable basis for jurisdiction, before the plaintiff sought to invoke any theory of *quasi in rem* jurisdiction; and
- the Court would be deciding the issue on hypothetical facts, "assumed" by the courts below, where the actual facts make clear that title to the property had passed to a third party before this action was filed.

RULE 29.6 STATEMENT

Respondent OJSC Novokuznetsky Aluminum Factory ("NKAZ") is a Russian corporation. Sixty-six percent of the stock of NKAZ is now owned by OJSC Russian Aluminum, the stock of which is not publicly held. No publicly held company owns ten percent or more of NKAZ's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
COUNTERSTATEMENT	4
REASONS FOR DENYING THE WRIT	11
I. THE FOURTH CIRCUIT'S RULING IS CONSISTENT WITH *SHAFFER*	12
II. THERE IS NO CONFLICT AMONG THE CIRCUITS	17
III. THIS IS NOT AN APPROPRIATE CASE FOR THE COURT'S REVIEW FOR OTHER COMPELLING REASONS	20
CONCLUSION	23

TABLE OF AUTHORITIES

Page

Cases:

American Constr. Mach. & Equip. Corp. v. *Mechanised Construction of Pakistan*, No. 85 Civ. 3765, 1986 WL 2973 (S.D.N.Y. Mar. 5, 1986) 20

Asahi Metal Industry Co. v. *Superior Court*, 480 U.S. 102 (1987) 17

CME Media Enterprises B.V. v. *Zelezny*, No. 01 Civ. 1733, 2001 WL 1035138 (S.D.N.Y. Sept. 10, 2001) 19

Conway v. *California Adult Authority*, 396 U.S. 107 (1969) 21-22

Dean Witter Reynolds Inc. v. *Byrd*, 470 U.S. 213 (1985) 14

Glencore Grain Rotterdam B.V. v. *Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002) 3, 17, 18

International Shoe Co. v. *Washington*, 326 U.S. 310 (1945) ..... *passim*

McDonald v. *City of West Branch*, 466 U.S. 284 (1984) 14

O'Connor v. *Lee-Hy Paving Corp.*, 579 F.2d 194 (2d Cir. 1978) 20

Rush v. *Savachuk*, 444 U.S. 320 (1980) 20

Seetransport Wiking Trader Schiffarhtgesellschaft MBH & Co. v. *Navimpex Centrala Navala*, 989 F.2d 572 (2d Cir. 1993) 19

Shaffer v. *Heitner*, 433 U.S. 186 (1977) ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
Soinco SACI et al. v. *Novokuznetsk Aluminum Plant et al.*, [1998] 2 Lloyd's Rep. 346, 1997 WL 1104502 (Court of Appeal, Dec. 16, 1997)	4, 16
Transatlantic Bulk Shipping Ltd. v. *Saudi Chartering S.A.*, 622 F. Supp. 25 (S.D.N.Y. 1985)	10
Statutes:	
9 U.S.C. §§ 201 *et seq.*	5
9 U.S.C. § 207	15
Articles 24-26 of the Supreme Soviet Decree of June 24, 1992, as amended by Russian Federal Law No. 144-FZ (Nov. 16, 1997)	16
Rule:	
S. Ct. Rule 10	1, 19
Treaty:	
International Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 3	5, 16
Other Authorities:	
Restatement (Second) of Conflict of Laws § 66 (1971)	15
Robert L. Stern *et al.*, *Supreme Court Practice* 225 (8th ed. 2002)	17

IN THE

Supreme Court of the United States

No. 01-1796

BASE METAL TRADING, LIMITED,

Petitioner,

v.

OJSC "NOVOKUZNETSKY ALUMINUM FACTORY," *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

Respondent OJSC Novokuznetsky Aluminum Factory ("NKAZ") respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Fourth Circuit.

INTRODUCTION

The petition in this case does not meet any of the established criteria for granting certiorari and presents no compelling reason why this Court should grant review. *See* S. Ct. Rule 10. Petitioner Base Metal Trading Ltd. (BMT), a Guernsey-registered metals trading company, sought in this case to obtain personal jurisdiction in Maryland over NKAZ,

an aluminum manufacturer located in Siberia, to confirm an arbitration award that BMT had obtained against NKAZ in Russia, in a dispute that had nothing to do with any alleged conduct or property in the United States. *See* J.A. 18-23.[1] The courts below held that NKAZ did not do business in Maryland and that there were no minimum contacts between NKAZ and Maryland, or between NKAZ and the United States as a whole, sufficient to justify the exercise of personal jurisdiction over NKAZ. BMT in its petition does not challenge these rulings.

Instead, BMT argues the novel theory that it is entitled to bring an action against NKAZ in the United States to confirm a foreign arbitration award, even though NKAZ has no minimum contacts with the forum state or the United States as a whole, if it is able to locate and attach aluminum manufactured by NKAZ in Russia which is en route to a customer in the United States. In effect, BMT claims the ability to force a foreign defendant, which does no business in the United States, to defend an action in a United States court seeking an *in personam* judgment confirming a foreign arbitration award, simply by attaching a shipment of metal and alleging—"contrary to the apparent facts," as the District Court noted, Pet. App. 27a—that this metal was the property of NKAZ.

There is no reason for this Court to review the Fourth Circuit's ruling rejecting this claim. BMT's novel theory was never presented to the District Court. On the contrary, BMT's complaint and all of its papers in the District Court asserted that NKAZ had minimum contacts with Maryland and the United States sufficient to establish *in personam* jurisdiction over NKAZ.

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[1] "J.A." refers to the Joint Appendix filed by the parties in the Fourth Circuit; "Pet." refers to the Petition for Certiorari; "Pet. App." refers to the Appendix to the Petition.

Moreover, the Fourth Circuit's ruling is fully consistent with the decisions of this Court, and particularly with this Court's decision in *Shaffer* v. *Heitner*, 433 U.S. 186 (1977). As the Fourth Circuit correctly recognized, Pet. App. 7a, *Shaffer* held that the "minimum contacts" standard of *International Shoe Company* v. *Washington*, 326 U.S. 310, 316 (1945), applies to all exercises of jurisdiction, including *in rem* and *quasi in rem* actions. 433 U.S. at 207-12. What petitioner describes as the "holding" of *Shaffer*, Pet. i, 7-8, was in fact *dicta* in a footnote, 433 U.S. at 210 n. 36, suggesting that an exception to the general rule might be appropriate where a plaintiff who had obtained a judgment in one state sought to collect that judgment against property owned by the defendant in another state. But even if that *dicta* states the correct legal rule with respect to judgments entitled to full faith and credit, there is nothing in *Shaffer* which relates in any way to the enforceability of a foreign arbitration award, a very different issue that this Court has never addressed.

Similarly, petitioner's claim that the decision below conflicts with a recent decision of the Ninth Circuit is baseless. In fact, the decision cited by petitioners, *Glencore Grain Rotterdam B.V.* v. *Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002), held that there was no jurisdiction over the foreign defendant, and merely suggested in *dicta* the possibility that a stronger showing in another case might support jurisdiction to confirm a foreign arbitration award based on property owned by the defendant in the state.

The decision below is thus the only appellate decision to address whether jurisdiction to enforce a foreign arbitration award can be based on the existence of property in a state in the absence of minimum contacts, and the Fourth Circuit faithfully applied this Court's precedents in holding that it cannot. In these circumstances, review by this Court is unwarranted. This is particularly true in light of other aspects of this case—including plaintiff's failure to raise the issue in the District Court, the fact that title to the property

had plainly passed to the purchaser long before the aluminum arrived in the United States, and the fact that the attachment of the metal has been released and no longer provides any basis for jurisdiction—that make this case a singularly inappropriate vehicle to consider the issue plaintiff seeks to raise.

COUNTERSTATEMENT

1. BMT is a Guernsey corporation engaged in metals trading, and alleges that its principal place of business is in London, England. J.A. 11. NKAZ is a Russian corporation that manufactures aluminum at its plant in Novokuznetsk, in the Kemerovo Region of Siberia. J.A. 11.[2]

From 1995 through 1999, BMT and NKAZ had extensive business dealings. J.A. 11, 20. On November 1, 1999, BMT filed an arbitration claim against NKAZ before the Moscow Chamber of Commerce and Industry. J.A. 18. BMT claimed that it had been compelled by the English courts to satisfy a prior arbitration award against NKAZ, which had been issued by a Zurich arbitration panel in favor of two NKAZ creditors, Soinco S.A.C.I., an Argentine corporation, and Eural KFT, a Hungarian corporation, based on NKAZ's alleged 1995 breach of its contracts to supply them with aluminum. J.A. 18-20.[3] After BMT paid the award, BMT sought reimburse-

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[2] "NKAZ" is short for Novokuznetsk Aluminum Zavod, the name of the company in Russian. ("Zavod" is the Russian word for "plant" or "factory.") "OJSC" stands for Open Joint Stock Company, a form of Russian corporation.

[3] The English courts had held it appropriate to require BMT to pay this debt owed by NKAZ because, at the time, the same individuals (Mikhail Zhivilo and his brother, Yuri Zhivilo) controlled both BMT and NKAZ, and because Mikhail Zhivilo had been responsible for directing NKAZ's aluminum production away from Soinco and Eural and towards his controlled entity, BMT, when he took control of NKAZ in 1995. *See Soinco SACI et al.* v. *Novokuznetsk Aluminum Plant et al.*, [1998] 2 Lloyd's Rep. 346, 348-49, 355-56, 1997 WL 1104502, at 4-7, 13-14 (C.A. Dec. 16, 1997).

ment from NKAZ for the amount it had paid on NKAZ's behalf. J.A. 20. On December 10, 1999, the Moscow arbitrators issued an award in favor of BMT in the amount of approximately $12 million. J.A. 18-23.

2. On June 29, 2000, BMT filed its complaint in this action, seeking a judgment confirming the Moscow arbitration award. BMT sought confirmation in accordance with the International Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 3 (reprinted in U.S.C.A. following 9 U.S.C. § 201), adopted in New York in 1958 ("the Convention"), and U.S. implementing legislation, codified at 9 U.S.C. §§ 201 *et seq*. The complaint named NKAZ as the sole defendant, and alleged that the court "has jurisdiction over NKAZ because, on information and belief, it transacts business in the State of Maryland through the Port of Baltimore." J.A. 12. The complaint cited no other basis for jurisdiction over NKAZ and made no reference to any alleged property of NKAZ in the State. The complaint sought an *in personam* judgment against NKAZ in the full amount of the arbitration award, approximately $12 million. J.A. 13.

On the same day, BMT filed a motion, under Rule 64 of the Federal Rules of Civil Procedure, to attach a cargo of aluminum that had allegedly arrived in the Port of Baltimore the night before. J.A. 31-36. BMT's motion alleged that the cargo of "aluminum T-bars" was "manufactured and presently owned" by NKAZ, J.A. 32, and that the value of the aluminum was approximately $3.8 million. J.A. 33. The District Court granted the requested attachment the same day. J.A. 37-40.

3. Approximately one week later, on July 7, 2000, independent third parties, MG Metal & Commodity Corp. and MG Metal & Commodity Co., Ltd. (collectively "MG"), moved to vacate the attachment. MG submitted extensive

documentation to show that it held title to the aluminum, and had title before the aluminum had arrived in Baltimore. These documents demonstrated that MG had purchased the aluminum from Aluminum of Siberia (UK) Ltd. pursuant to a contract dated April 19, 2000, on terms "F.O.B. St. Petersburg"; that MG had thus acquired title to the aluminum when it was loaded on the vessel at the time of its departure from St. Petersburg, Russia, on or about April 28, 2000; and that MG had fully paid for the aluminum. *See* Emergency Motion to Vacate Attachment, filed July 7, 2000, and Decl. of Martin T.O. Stanley, dated July 7, 2000, ¶¶ 4-5 and Ex. A-K. The District Court granted this motion the same day, and entered an order vacating the attachment. The Court's order directed, however, that the proceeds of the sale of the metal be held in escrow until further order. J.A. 45.

On July 19, 2000, MG filed a motion to vacate the order requiring the funds to be held in escrow. MG's motion cited BMT's failure to provide any evidence that NKAZ rather than MG held title to the aluminum. MG also noted its own financial solvency. *See* Motion to Vacate Order Establishing Escrow Account, filed July 19, 2000, and Mem. of Law in support thereof, at 3-5, 7. In response, BMT did not seriously dispute that MG held title, but argued instead that MG was not a bona fide purchaser. *See* Plaintiff's Mem. of Law in Opp. to Mot. to Vacate Order Establishing Escrow Account, filed Aug. 27, 2000, at 2-3.

After full briefing, the District Court issued an opinion dated October 18, 2000, indicating that it intended to grant this motion.[4] The Court reasoned that "[t]he purpose of the July 7 Order was to permit MG to deal with the metal while preserving the status quo by having the escrowed funds stand in the place of the metal while the merits of the attachment were sorted out," App. E at 2a, and that there was no further

[4] A copy of the Court's Memorandum and Order of October 18, 2000 is included at the back of this Brief in Opposition as Appendix E.

need for the July 7 order in light of MG's showing that it had the ability to pay any judgment and its agreement to subject itself to the jurisdiction of the court. App. E at 2a-3a. The Court stated, however, that it would "briefly, defer issuing an Order * * * to afford Plaintiff the opportunity to file a claim against MG in this Court while the subject metal (and the escrow account held as a substitute for the metal) are within the jurisdiction of the Court." App. E at 3a.

BMT failed, however, to take advantage of this opportunity to bring MG into the lawsuit as a party so that it could contest MG's title to the aluminum. *See* Pet. App. 3a, 27a n.3. Accordingly, on October 26, 2000, the District Court issued an order granting MG's motion to vacate the July 7 order, and ordering that "[a]ll monies deposited in the escrow account * * * be immediately released to [MG]." J.A. 49-50. Thus, since October 26, 2000, at the latest, there have been no property or funds subject to the jurisdiction of the District Court that even arguably belonged to, or could be traced to, NKAZ.

4. BMT made no effort to serve NKAZ until August 15, 2000. According to an affidavit later filed by BMT, on that date it sent a copy of the summons and complaint to NKAZ in Novokuznetsk by use of a commercial courier service. J.A. 85. NKAZ did not respond to the complaint, and later challenged the adequacy of this purported service of process. On January 18, 2001, BMT filed a motion for entry of a default judgment. On January 25, 2001, the District Court granted the motion for a default, and on January 26, the clerk entered a default judgment against NKAZ. J.A. 53, 55.

Upon learning of the default judgment, NKAZ moved promptly on February 14, 2001 to vacate it. In support of its motion, NKAZ argued that BMT's alleged service of process on NKAZ was invalid, and that NKAZ was not subject to the jurisdiction of the court. In response, BMT asserted that it had demonstrated that NKAZ had minimum contacts with

Maryland sufficient for the Court to exercise personal jurisdiction, or alternatively, that BMT should be granted an opportunity for discovery in an effort to demonstrate minimum contacts. *See* Plaintiff's Mem. of Law in Opp. to Mot. to Vacate Default Judgment, filed Feb. 28, 2001, at 10-13; Plaintiff's Sur-Reply Mem., filed Mar. 16, 2001, at 6-7. BMT never asserted that the Court could have jurisdiction over NKAZ without minimum contacts, based on the alleged presence of its property in the State, and never cited *Shaffer* v. *Heitner*, the case BMT now claims supports that position.

5. On April 3, 2001, the District Court granted NKAZ's motion to vacate the default judgment and dismissed the complaint for lack of personal jurisdiction. Pet. App. 20a-28a.[5] On the jurisdictional issue, the District Court applied the minimum contacts test of *International Shoe Co.* v. *Washington*, 326 U.S. 310, and held that it did not have personal jurisdiction over NKAZ because "NKAZ is a Russian corporation with its principal place of business there and having no connection with Maryland." Pet. App. 27a. With respect to the metal that NKAZ had shipped to Baltimore, the District Court held that even "[a]ssuming, contrary

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[5] BMT asserts that the District Court "dismissed the case *sua sponte*," Pet. 5, but this assertion is not correct. NKAZ argued at length in its motion to vacate the default that the court lacked personal jurisdiction over NKAZ, *see* Mem. in Support of Mot. to Vacate Default Judgment, filed Feb. 14, 2001, at 12-16; attached a declaration from S.A. Tchernyshov attesting to NKAZ's lack of contacts with Maryland and the United States, J.A. 93-94; and specifically asked, in its proposed order, for the District Court to dismiss the case. *See* Proposed Order, filed Feb. 14, 2001. In response, BMT devoted a full section of its memorandum to an effort to demonstrate that "NKAZ has sufficient minimum contacts in order to exercise personal jurisdiction." Plaintiff's Mem. in Opp. to Mot. to Vacate Default Judgment, filed Feb. 28, 2001, at 10-13. Indeed, in a rare moment of candor, BMT conceded in its motion for reconsideration that "NKAZ also argued in its motion [to vacate the default] that this Court lacked personal jurisdiction over NKAZ." Plaintiff's Mot. for Reconsid., filed Apr. 17, 2001, at 1, ¶ 1.

to the apparent facts," that this metal belonged to NKAZ at the time it arrived in the United States, "there would still be no adequate jurisdictional nexus." *Id.* As the court explained, "the hypothetical NKAZ shipment of its metal and sale in Maryland would permit specific jurisdiction over NKAZ over a lawsuit relating to the shipment," but "[b]y no stretch could the single shipment, or even several such shipments, constitute continuous and systematic contacts with Maryland so as to justify general jurisdiction over NKAZ." *Id.* The District Court also rejected BMT's request to conduct discovery on the jurisdictional issue. *Id.* at 27a-28a.

6. On April 17, 2001, BMT filed a motion for reconsideration in the District Court. BMT's motion argued for the first time that jurisdiction could be premised on Rule 4(k)(2) of the Federal Rules of Civil Procedure, which permits the court to consider the contacts of the defendant with the entire United States upon a showing that the defendant's contacts with any individual state are not sufficient to provide a basis for jurisdiction. BMT also sought discovery to permit it to locate additional contacts that NKAZ allegedly may have with the United States. Again, however, BMT did not argue that jurisdiction could be based on the alleged presence of NKAZ property in Maryland, even without minimum contacts, and again BMT did not cite *Shaffer* v. *Heitner*.

On June 14, 2001, the District Court denied the motion for reconsideration. Assuming without deciding that the motion was procedurally proper, the District Court held that Rule 4(k)(2) was inapplicable because BMT—rather than demonstrating that there was no basis for jurisdiction over NKAZ in any state, as the Rule required—was contending actively that courts in several other states had jurisdiction over NKAZ. Pet. App. 13a-17a.

7. BMT appealed. In its brief on appeal, BMT for the first time argued that the presence of alleged NKAZ property in

Maryland was sufficient to give the District Court jurisdiction over NKAZ for purposes of BMT's action to confirm and enforce the arbitration award, even without minimum contacts. *See* Brief of Appellant, filed Sept. 18, 2001, at 11, 15-18.

8. The Fourth Circuit affirmed. Initially, the Court of Appeals held that the Convention and implementing legislation, while conferring subject matter jurisdiction on the federal courts over an action to confirm a foreign arbitration award, did not eliminate the need for a plaintiff to establish a constitutional basis for exercising personal jurisdiction over the defendant. Pet. App. 5a (citing *Transatlantic Bulk Shipping Ltd.* v. *Saudi Chartering S.A.*, 622 F. Supp. 25, 27 (S.D.N.Y. 1985) (Leval, J.)).

Applying the "minimum contacts" test of *International Shoe*, the Court of Appeals then held that there was no basis for personal jurisdiction over NKAZ. Pet. App. 5a-10a. The Court noted that BMT's cause of action did not arise out of any alleged NKAZ contact with Maryland and had no relationship to the shipment of aluminum that had arrived in the Port of Baltimore, Pet. App. 8a-9a; that there was no evidence that "NKAZ even attempted to do business in Maryland at all," Pet. App. 9a; that NKAZ was a Russian corporation whose "business consists entirely of manufacturing aluminum in its Russian plant," *id.*; and that NKAZ had no offices or agents in Maryland, "has never conducted a financial transaction in Maryland, and has no assets of any kind in Maryland." *Id.* In this light, the Court held, "[t]he mere fact that metal NKAZ manufactured in Russia was shipped to the United States does not amount to significant contacts with Maryland." *Id.*

The Court rejected BMT's argument that the presence of a single shipment of alleged NKAZ aluminum in Maryland was a sufficient basis for jurisdiction. Pet. App. 6a-7a, 8a-9a. The Court noted that "it is not clear that the aluminum in

question belonged to NKAZ." Pet. App. 8a. "Even assuming, however," that it did belong to NKAZ, the Court held that this did not provide any constitutional basis for jurisdiction. *Id.* As the Court explained, this Court's decision in *Shaffer* v. *Heitner* "eliminated all doubt that the minimum contacts standard in *International Shoe* governs *in rem* and *quasi in rem* actions as well as *in personam* actions." Pet. App. 7a (citing *Shaffer*, 433 U.S. at 207-212). The Court ruled that *Shaffer* also makes clear that "the presence of [the defendant's] property [in a state] alone will not support jurisdiction" in the absence of any "other ties" between the defendant and the forum state. Pet. App. 7a (citing *Shaffer*, 433 U.S. at 209).

The Court also rejected BMT's argument that Rule 4(k)(2) provides a basis for jurisdiction in this case, on the ground, *inter alia*, that BMT had failed to show that NKAZ had minimum contacts with the United States as a whole, Pet. App. 10a, and BMT's argument that the District Court had abused its discretion in denying its request to conduct jurisdictional discovery. Pet. App. 12a n.3.

REASONS FOR DENYING THE WRIT

BMT does not seek review of the Fourth Circuit's holdings that there were no minimum contacts between NKAZ and Maryland, or between NKAZ and the entire United States, sufficient to provide a constitutional basis for the exercise of jurisdiction. Thus, the sole issue presented by the petition is whether, in the absence of minimum contacts, the presence in Maryland of a single shipment of aluminum allegedly belonging to NKAZ provides a constitutionally sufficient basis for jurisdiction over this action.

This issue does not warrant review by this Court. The Fourth Circuit faithfully applied *Shaffer* in the particular context of an action to confirm a foreign arbitration award, and nothing in *Shaffer* raises any question about the correctness of the Fourth Circuit's ruling. Similarly, contrary to the

claims of the petition, the Fourth Circuit's ruling is not in conflict with the decision of any other circuit. The Ninth Circuit decision upon which BMT principally relies in fact concluded—like the decision below—that there was no constitutional basis for jurisdiction to confirm the foreign arbitration award, and merely suggested in *dicta* that the result might have been different on other facts. There have been few court decisions involving this narrow issue, and thus there is substantial reason to doubt both the importance of the question presented and the need for the Court to resolve it at this time. Finally, the record shows that the issue petitioner seeks to raise was not squarely presented below and is based on a hypothetical version of the facts. Thus, this would not be an appropriate case for the Court's review, even if the issue were otherwise sufficiently important and ripe to warrant review.

I. THE FOURTH CIRCUIT'S RULING IS CONSISTENT WITH *SHAFFER*.

1. Contrary to petitioner's claims, the Fourth Circuit's decision is fully consistent with, and indeed mandated by, this Court's decision in *Shaffer* v. *Heitner*. In *Shaffer*, the Court held unconstitutional a Delaware statute that permitted an action against non-resident defendants based on their ownership of property within the state, to wit, their shares in a Delaware corporation. The Court expressly rejected the argument that the "minimum contacts" test was irrelevant because the action was *quasi in rem*, based on the attachment of property within the state. 433 U.S. at 196, 205-206. Rather, as the Fourth Circuit noted below, Pet. App. 7a, the Court recognized that a judicial assertion of jurisdiction over property is, in effect, an assertion of jurisdiction over the interests of the defendant in that property, and thus must satisfy the "minimum contacts" standard of *International Shoe* with respect to the defendant. 433 U.S. at 207.

Accordingly, the Court in *Shaffer* held that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Id.* at 212. While "the presence of property in a State may bear on the exercise of jurisdiction by providing contacts among the forum State, the defendant and the litigation," *id.* at 207, "the presence of the property alone would not support the State's jurisdiction." *Id.* at 209. The Court recognized that this approach "would result in significant change" in determining jurisdiction in *quasi in rem* actions, particularly "where the property which now serves as the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action." *Id.* at 208-209.

The Fourth Circuit's holding that the alleged presence of NKAZ property in Maryland does not alone suffice to support jurisdiction in this case thus falls squarely with the rule announced in *Shaffer*. This is particularly true because BMT in this case was seeking an *in personam* judgment against NKAZ, confirming the arbitration award in an amount that substantially exceeded the alleged value of the property sought to be attached. But even if this action is viewed as one *quasi in rem*—notwithstanding BMT's failure to advance that theory in the complaint or at any time when there was still property subject to the jurisdiction of the court—the Fourth Circuit correctly held that, under *Shaffer*, jurisdiction in *in rem* or *quasi in rem* actions likewise must be subject to the minimum contacts test.

2. BMT relies principally on a single footnote in the *Shaffer* opinion, 433 U.S. at 210 n.36, which stated: "Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an initial matter." Although BMT refers to this as "the holding of *Shaffer*," Pet. i, 7, it is obviously no more

than *dicta* observing that there might be a basis for a different result in a context not then before the Court.

More important, this *dicta* has no bearing on the issue presented in this case: jurisdiction to enforce a foreign arbitration award. The *Shaffer* footnote refers to the enforceability of a court *judgment* obtained in a sister state, and the accompanying text makes clear that the Court was referring only to a court judgment that would be entitled to full faith and credit. 433 U.S. at 210 ("The Full Faith and Credit Clause, after all, makes the valid *in personam* judgment of one State enforceable in all other States."). Thus, even if this *dicta* states the correct legal rule as to jurisdiction to enforce a sister-state judgment, the *Shaffer* footnote has no bearing on jurisdiction to enforce a foreign arbitration award, which does not involve a court judgment, does not include the same guarantee that the defendant received due process before the claim was adjudicated, and does not have the same constitutional imperative requiring recognition under the Full Faith and Credit Clause.

This Court has repeatedly emphasized that an arbitration award does not have the same status as a court judgment and is not entitled to the same binding effect. *See, e.g., Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 222-223 (1985) ("[T]he preclusive effect of arbitration proceedings is significantly less well settled than the lower court opinions might suggest * * * . The full faith and credit statute requires that federal courts give * * * preclusive effect to a State's *judicial proceedings* * * *; [but] since arbitration is not a judicial proceeding, * * * the statute does not apply to arbitration awards.") (emphasis in original); *McDonald* v. *City of West Branch*, 466 U.S. 284, 288, 292 (1984) (holding that federal courts are not obligated by the full-faith-and-credit statute to give res judicata or collateral estoppel effect to an arbitration award, because "[a]rbitration is not a 'judicial proceeding,'" and there is no basis for judicial creation of a rule requiring

such preclusive effect, because "an arbitration proceeding cannot provide an adequate substitute for a judicial trial").

Petitioner's suggestion that the Court's *dicta* in *Shaffer*—applicable at most to enforcement of court judgments entitled to full faith and credit—is readily transferable to the far more complicated issue of jurisdiction to enforce a foreign arbitration award, is thus far too facile. In fact, this Court has never spoken to the question of jurisdiction to enforce a foreign arbitration award.[6]

Moreover, there are other important distinctions between a sister-state judgment and an arbitration award. In addition to the points noted above, there are substantial grounds for defense in an action to enforce a foreign arbitration award that are permitted by the Convention and implementing legislation. Title 9, U.S. Code, Section 207 provides that the

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[6] BMT's petition also includes a quotation from the text of the Court's opinion, Pet. 8-9, but petitioner deletes by ellipsis crucial portions of the Court's reasoning, which make clear that *Shaffer* provides no basis for, and indeed rejects, BMT's argument. Petitioner quotes the Court's statement that the "primary rationale for treating the presence of property as a sufficient basis for jurisdiction * * * is that a wrongdoer 'should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit,'" 433 U.S. at 210 (quoting Restatement (Second) of Conflict of Laws § 66, cmt. a (1971)).

BMT neglects to advise the Court, however, that the *Shaffer* Court rejected this argument. BMT omits the following sentences: "This justification does not explain why jurisdiction should be recognized without regard to whether the property is present in the State because of an effort to avoid the owner's obligations. Nor does it support jurisdiction to adjudicate the underlying claim." 433 U.S. at 210. In this case, of course, there is no evidence that NKAZ was seeking to move its property to Maryland in order to avoid its obligations in Russia; in fact, all of NKAZ's assets remain in Russia, subject to the jurisdiction of the Russian courts. Nor, as discussed above, is there any jurisdictional basis for permitting litigation in this forum of the "underlying claim" against NKAZ, the validity of the Russian arbitration award.

court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition * * * specified in the * * * Convention." Article V of the Convention provides that it is a defense if "[t]he party against whom the award is invoked was not given proper notice * * * of the arbitration proceedings or was otherwise unable to present his case," Art. V, §1(b), or if "[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." Art. V, §1(e).

These grounds for defense are not simply of academic interest. NKAZ in fact has substantial grounds for defense against the arbitration award at issue in this case. There is a strong argument that the arbitration award at issue here was collusive, and that NKAZ did not have a fair opportunity "to present [its] case" within the meaning of Article V, Section 1(b).[7] Moreover, NKAZ may also have a substantial argument that the award is not "binding" under Russian law, and therefore not enforceable under Article V, Section 1(e). In fact, the Russian courts have refused to enforce this same arbitration award in bankruptcy proceedings involving NKAZ, for precisely this reason.[8]

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[7] As noted above, *see* n.3, *supra*, at the time of the arbitration award, the same individuals (Mikhail and Yuri Zhivilo) controlled both BMT and NKAZ. The arbitration award reveals on its face that NKAZ did not present any defense on the merits, J.A. 21-22, even though the English courts found that Mikhail Zhivilo was responsible for causing NKAZ to breach its contracts with Soinco and Eural, *see Soinco SACI*, [1998] 2 Lloyd's Rep. at 348-49, and this could have provided a substantial defense to BMT's claim that its liability should be shifted to NKAZ.

[8] *See* Addendum 2 to the Brief of Appellee (4th Cir. filed Oct. 19, 2001) (attaching the decision of the Arbitrazh Court of the Kemerovo Region of Russia, Mar. 17, 2000). The Russian court relied on a Russian law which provides that a Russian arbitration award that has not been voluntarily honored is not enforceable until the party seeking to enforce the award brings a judicial action in Russia to obtain an enforcement order, *see* Articles 24-26 of the Interim Provision on Courts of Arbitration for Economic Disputes,

In these circumstances, as the Fourth Circuit found, Pet. App. 7a-10a, it is manifestly unfair to force NKAZ to come to a distant forum, with which it has no other connection, to litigate such substantial issues going to the merits of the validity of this arbitration award. *See Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102, 114 (1987) (giving "significant weight" to the unfairness of subjecting Asahi to the "severe" and "unique" burdens of having to litigate at such a distance from its headquarters in Japan and to defend itself in a foreign legal system).

II. THERE IS NO CONFLICT AMONG THE CIRCUITS.

BMT also attempts to argue that there is a conflict among the circuits that requires this Court's intervention (Pet. 7-11), but this argument is also without merit. BMT relies on the Ninth Circuit's decision in *Glencore Grain Rotterdam B.V.* v. *Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002), but again petitioners are seeking to rely on *dicta* in a decision that in fact was decided adversely to them. *See* Robert L. Stern *et al.*, *Supreme Court Practice* 225 (8th ed. 2002) (mere "inconsistency in dicta" does not warrant grant of certiorari). In *Glencore Grain*, the Ninth Circuit held that that there was no constitutional basis for jurisdiction over an action brought by the plaintiff, a Dutch grain distributor, against Shivnath, an Indian rice supplier, to enforce an arbitration award that Glencore Grain had obtained in England. 284 F.3d at 1123-28. The Ninth Circuit rejected Glencore Grain's argument that the Convention and implementing legislation eliminated the need for a plaintiff seeking to confirm a foreign arbitration award to establish that there was a constitutional basis for personal jurisdiction over the

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adopted by the Supreme Soviet Decree of June 24, 1992, as amended by Russian Federal Law No. 144-FZ, dated Nov. 16, 1997 (translation attached hereto as Appendix F), and here BMT failed to take any steps to obtain an order enforcing its arbitration award in Russia. *See* Br. of Appellee (4th Cir.) at Add. 5-6.

defendant. *Id.* at 1120-22. On the contrary, the Court held that jurisdiction in an action to confirm an arbitration award must be determined "by inquiring whether maintenance of a suit against the defendant comports with the constitutional notions of due process as outlined in *International Shoe Co.* v. *Washington.*" *Id.* at 1121. Applying this traditional test, the Court held that there were no minimum contacts to support jurisdiction, even though Shivnath had a sales agent in California and had sent fifteen shipments of rice to San Francisco. *Id.* at 1124-25. The Court also held that the exercise of jurisdiction over Shivnath would be unreasonable, in view of the burden on Shivnath to defend in California and the absence of any connection between the forum state and the underlying cause of action. *Id.* at 1125-26.

It is true that the Court in *dicta* suggested that jurisdiction to confirm a foreign arbitration award might conceivably be premised on the existence of specific assets of the defendant in California. *Id.* at 1127. But the Court went on to hold that this potential theory of jurisdiction did not assist Glencore Grain, because it had been unable to identify any property of the defendant in the jurisdiction. *Id.* at 1127-28. Thus, this aspect of the Court's opinion was not necessary to its decision, and was not fully considered.[9] In any event, it is equally true here that there is no NKAZ property subject to the jurisdiction of the court, since the aluminum at issue belonged to MG, not NKAZ, and was released from the Court's jurisdiction before BMT ever sought to invoke *quasi in rem* jurisdiction. Thus, *Glencore Grain* provides no support for BMT's jurisdictional claim in this case.

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[9] Among other things, the Ninth Circuit failed to discuss the significant distinctions between a sister-state judgment and a foreign arbitration award, as discussed above, and incorrectly read the *Shaffer* footnote as having "endorsed the position urged by Glencore Grain," 284 F.3d at 1127, when in fact the Court in *Shaffer* never considered it.

The only other case cited by petitioner in support of its alleged conflict among the circuits is a recent decision of the District Court for the Southern District of New York, *CME Media Enterprises B.V.* v. *Zelezny*, No. 01 Civ. 1733, 2001 WL 1035138 (S.D.N.Y. Sept. 10, 2001). In *Zelezny*, CME Media, a Dutch company, had obtained an arbitration award in Amsterdam against Zelezny, a Czech citizen, for approximately $23 million, and filed an action to confirm the award in the Southern District of New York. CME Media conceded that there was no basis for personal jurisdiction over Zelezny, but argued that the court had jurisdiction to confirm and enforce the award because Zelezny had an account at Citibank. 2001 WL 1035138, at *1. By the time the district court heard the case, however, there was only $0.05 left in the account. The court held that it had no jurisdiction to confirm an award for $23 million, but did have jurisdiction to enforce the award against the five cents left in the account. *Id.* Relying on the footnote in *Shaffer*, and treating an arbitration award as if it were a court judgment entitled to full faith and credit, the court held that it had *quasi in rem* jurisdiction to the extent of the defendant's property in the state, and that "minimum contacts are not required." *Id.* at *3.

This unreported district court decision provides no basis for the Court to grant certiorari. Obviously, this decision does not suffice to demonstrate a conflict among the circuits. See S. Ct. Rule 10(a) (Court will consider granting certiorari when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals"). This is particularly true since *Zelezny* appears inconsistent with Second Circuit opinions that, while not confronting precisely the same issue, suggest that personal jurisdiction and minimum contacts are required in an action to confirm a foreign arbitration award. *See Seetransport Wiking Trader Schiffarhtgesellschaft MBH & Co.* v. *Navimpex Centrala Navala*, 989 F.2d 572, 580 (2d Cir. 1993)

(personal jurisdiction is required in action to enforce foreign arbitration award, and test is "minimum contacts"); *O'Connor* v. *Lee-Hy Paving Corp.*, 579 F.2d 194, 198 (2d Cir. 1978) ("If plaintiffs * * * had 'attached' the debt to defendants of a debtor only transitorily in New York, * * * or even bank accounts maintained by them in New York, we would readily agree that attachment jurisdiction could not be sustained when, as here, the defendants had no other 'contacts' with New York. In such a case, *Shaffer* v. *Heitner* clearly forbids a state from depriving a defendant of his property in the debt that is owed to him unless other contacts make it fair to do so."), *abrogated on other grounds*, *Rush* v. *Savachuk*, 444 U.S. 320 (1980); *see also American Constr. Mach. & Equip. Corp.* v. *Mechanised Construction of Pakistan*, No. 85 Civ. 3765, 1986 WL 2973, at *5 (S.D.N.Y. Mar. 5, 1986) (observing that the footnote in *Shaffer* "concerned the enforceability of a domestic state judgment, and may not be applicable * * * to enforcement of an arbitral award based on treaty"). Moreover, even if *Zelezny* were correctly decided, it upheld jurisdiction only to the extent of the amount of assets remaining before the court, and would be of no assistance to BMT here, since the aluminum in question has long since been released and there is no property of NKAZ currently subject to the court's jurisdiction.

III. THIS IS NOT AN APPROPRIATE CASE FOR THE COURT'S REVIEW FOR OTHER COMPELLING REASONS.

In any event, even if the Court believes that the issue presented is one that ultimately might warrant the Court's review, it would be premature to do so now, and there are compelling reasons why this case does not present an appropriate vehicle for the Court to consider the issue.

First, as noted above, BMT failed to raise the issue in the District Court. BMT raised the issue for the first time in the

Court of Appeals, long after the property at issue had been released from the jurisdiction of the court.

Second, there is no longer any alleged NKAZ property within the jurisdiction of the court, and thus no basis for the Court to sustain *quasi in rem* jurisdiction on the theory advanced by BMT. Both the aluminum at issue, and the funds that were once held in escrow as substitute property, have long since been released, in light of BMT's failure to make any claim that MG did not legitimately hold title to the metal.

Third, BMT is asking the Court to decide an important constitutional issue on hypothetical facts. There is no evidence that the aluminum that BMT initially attached was in fact the property of NKAZ at *any* relevant time. On the contrary, the documentary evidence submitted to the District Court demonstrated beyond reasonable dispute that title to the property had passed to MG, an independent bona fide purchaser, long before the aluminum ever reached the United States.[10] Both courts below simply "assumed," for ease of disposition, that the property belonged to NKAZ, Pet. App. 8a, 27a, and the District Court recognized that this assumption was "contrary to the apparent facts." Pet. App. 27a. This Court should not put itself in the position of rendering a decision on an important constitutional issue on "hypothetical" facts, when it is likely that further proceedings on remand would demonstrate that the assumption on which the Court's decision was based was false, and that there is no basis for jurisdiction in this case even if BMT's theory were accepted. *See Conway* v. *California Adult Auth.*, 396 U.S.

[10] Indeed, BMT never challenged in the lower courts MG's showing that it held title to the aluminum when it arrived in Baltimore, Pet. App. 3a n.1, 27a, and BMT shifted its legal theory from the claim that NKAZ "presently owned" the aluminum (as alleged in the attachment motion, J.A. 32 ¶ 4) to the claim that "rightful title" never passed to MG because of the allegedly fraudulent conduct of NKAZ. *See* Br. of Appellant (4th Cir., filed Sept. 18, 2001), at 2.

107, 109-110 (1969) (dismissing writ as improvidently granted, where it appeared on full briefing that there was "documentary evidence that the actual facts simply do not present the issue for which certiorari was granted," and Court would in effect be "rendering an advisory opinion" on the "hypothetical issue tendered by the petition").

Fourth, a decision sustaining jurisdiction in this case would seriously interfere with the flow of international commerce. This is not a case where the defendant owned real property in Maryland or maintained a bank account within the state. Rather, the property here was a shipment of aluminum in international commerce, in transit to a bona fide customer. Even assuming that this shipment belonged to NKAZ at the moment it arrived in Baltimore, the property was clearly in transit and was, at most, only briefly and temporarily the property of NKAZ while it was within the state.

Thus, if the Court were to grant review in this case, it would be forced to consider the issue presented on very problematic facts. It is much harder to justify reliance on property in transit as a constitutional basis for jurisdiction, and a decision permitting such jurisdiction would reward and encourage attachments that risk serious interference with the flow of international trade.

This is particularly true since there is no justification in this case for an attachment of this kind. BMT argues that there is a need for attachment jurisdiction to prevent a "wrongdoer" from "avoid[ing] payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit," Pet. 9 (quoting *Shaffer*, 433 U.S. at 210), but the facts of this case do not present any such justification for jurisdiction. This case involves a company legitimately involved in international trade, not someone trying to hide his assets. NKAZ continues to be in full operation in Novokuznetsk, all of its assets are located there, and there is no

reason why BMT cannot seek to enforce its arbitration award in the Russian courts.

Finally, review in this case would be particularly inappropriate because, as noted above, NKAZ has substantial defenses to the validity of the underlying arbitration award, and it would be unfair to require NKAZ to litigate the merits of these issues in a distant forum.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. MJG-00-1973

BASE METAL TRADING, LTD.

Plaintiff

v.

OJSC "NOVOKUZNETSKY ALUMINUM FACTORY"

Defendant

MEMORANDUM AND ORDER

This Court has before it the Motion to vacate Order Establishing Escrow Account and the materials submitted relating thereto. The Court has conferred with counsel and finds a formal hearing unnecessary.

The matter can be discussed succinctly. During the years 1995 through 1999, Plaintiff Base Metal Trading, Ltd., a metal dealer, and Defendant NKAZ, a Russian aluminum producer, had various business dealings. A dispute arose which ended up with the December 10, 1999 issuance of a Russian arbitration award in favor of BMT and against NKAZ in the amount of approximately $12,000,000. *Vis-a-vis* NKAZ, Plaintiff BMT seeks confirmation of the arbitration award.

The dispute between Plaintiff and Defendant had no connection with the District of Maryland. Nevertheless, on

or about June 28, 2000, a foreign vessel, M/V SALVADOR, carrying some 2,563 metric tons of aluminum docked in the Port of Baltimore. On June 29, 2000, Plaintiff BMT filed a Motion under Rule 64 of the Federal Rules of Civil Procedure seeking seizure or attachment of the aluminum that was alleged to be the property of Defendant NKAZ. The motion was granted and the property was taken into custody by the U.S. Marshal. Shortly thereafter, MG Metal & Commodity Corp. and MG Metal & Commodity Co., Ltd (collectively "MG") claimed ownership of the seized aluminum and moved to vacate the attachment. On July 7, 2000, the Court issued an Order vacating the attachment, giving MG custody and control of the aluminum, and providing for the placement into an escrow account of any funds derived from the sale of the aluminum. The purpose of the July 7 Order was to permit MG to deal with the metal while preserving the status quo by having the escrowed funds stand in the place of the metal while the merits of the attachment were sorted out.

At this time, at least a portion of the metal at issue has been sold and the proceeds placed in escrow. MG has presented evidence satisfying the Court that it is solvent and would be able to satisfy a judgment in an amount substantially greater than the value of the metal that was seized. Moreover, MG has acknowledged that if a claim is made against it by Plaintiff, it would be subject to the jurisdiction of this Court with respect to an amount equal to the value of the seized metal.

Under the circumstances, the Court does not find there to be a valid reason to continue the seizure or escrow arrangement in effect. If Plaintiff decides to proceed with its claim against MG in this Court, it will have an opportunity to do so promptly.

For the foregoing reasons:

1. The Motion to Vacate Order Establishing Escrow Account shall be GRANTED.

2. The Court shall, briefly, defer issuing an Order granting the Motion to afford Plaintiff the opportunity to file a claim against MG in this Court while the subject metal (and the escrow account held as a substitute for the metal) are within the jurisdiction of the Court.

3. By October 23, 2000, Plaintiff shall file any claim against MG relating to the metal at issue.

So ORDERED this 18th day of October, 2000.

/s/
Marvin J. Garbis
United States District Judge

APPENDIX F

INTERIM PROVISION ON COURTS OF ARBITRATION FOR ECONOMIC DISPUTES

ADOPTED BY THE SUPREME SOVIET DECREE OF JUNE 24, 1992

AS AMENDED BY RUSSIAN FEDERAL LAW NO. 144-FZ, NOV. 16, 1997

Section V. Execution of Award Issued by Arbitration Court

Article 24. Procedure for Execution of Award Issued by Arbitration Court.

An award issued by an arbitration court shall be executed voluntarily in accordance with the procedure and within the time limits provided in the award. In the event the time limits for execution of the award have not been specified in the award, the latter shall be subject to immediate execution.

Article 25. Enforcement of Award Issued by Arbitration Court.

Amendments were made in Article 25 of this Interim Provision by Federal Law No. 144-FZ of November 16, 1997.

In the event the defendant fails to execute the award within the established time limits, an enforcement order shall be issued by the Arbitrazh Court of the Russian Federation, or the Arbitrazh Court of the province, region, city, autonomous region or autonomous district where the arbitration court is located.

An application for issuance of an enforcement order is submitted by the successful party:

- to the Arbitrazh Court specified in Part 1 of this article;
- to the permanent arbitration court which has reviewed the case.

The application can be submitted within one month after expiration of the term for execution of the award issued by the arbitration court.

Documents confirming non-execution of the award issued by an arbitration court and evidence of payment of state duty shall be attached to the application.

The permanent arbitration court shall forward the application to the Arbitrazh Court entitled to issue the enforcement order within five days after receipt of the application.

In the event of failure to meet the time limits for submission of the application or failure to enclose the necessary documents, the Arbitrazh Court shall return the application without consideration.

Given justifiable reasons for failure to meet the time limits for submission of an application for issuance of enforcement order, the term may be restored by the Arbitrazh Court upon a petition filed by the party.

The application shall be considered by a sole Arbitrazh Judge within one month after its receipt by the Arbitrazh Court.

Upon consideration of the application, a ruling on issuance of an enforcement order or on refusal to issue an enforcement order shall be taken.

Article 26. Grounds for Refusal to Issue the Order.

The Federal Law on November 16, 1997, No 144-FZ, amended Article 26 of the present Interim Provision.

The Arbitrazh Court is entitled to refuse to issue an enforcement order in the event:

- the parties have not agreed on submission of the dispute to the arbitration court;
- the arbitration court panel or the procedure employed in consideration of the dispute did not correspond to the agreement of the parties regarding trial before an arbitration court;
- the defeated party was not duly informed of the date of the proceeding in the arbitration court or was not otherwise able to present its case;
- the dispute arose out of administrative or other relations, not civil relations, and was not subject to consideration by an arbitration court.

The ruling taken by the Arbitrazh Court may be appealed in accordance with the procedure stipulated by the Arbitrazh Procedural Code of the Russian Federation.

If it shall be established in the course of consideration of the application for issuance of an enforcement order that the decision does not comply with legislation or has been adopted without consideration of submitted materials, the Arbitrazh Court shall resubmit the case for a new trial before the arbitration court that issued the award on the case.

In case it is not possible to submit the case to the same arbitration court, the claim may be submitted to the Arbitrazh Court in accordance with established court jurisdiction.

REPLY

BRIEF

Supreme Court U.S.
FILED
AUG 1 2002
OFFICE OF THE CLERK

No. 01-1796

In the Supreme Court of the United States

BASE METAL TRADING, LIMITED,

Petitioner,

v.

OJSC "NOVOKUZNETSKY ALUMINUM FACTORY," ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

I. The Fourth Circuit's Ruling Contradicts *Shaffer v. Heitner* 1

II. A Conflict Among the Circuits on the Proper Interpretation of *Shaffer v. Heitner* Exists and May Deepen 5

III. The Issue Presented by this Petition is Ripe for Review on Assumed Facts to Allow this Court to Pass on an Important Issue of Public Policy and International Law 7

Conclusion 9

TABLE OF AUTHORITIES

Cases :

American Construction Mach. & Equip. Corp. v. Mechanised Construction of Pakistan, 1986 U.S. Dist. LEXIS 28551 (S.D.N.Y., Mar. 6, 1996) 5

Base Metal Trading, Ltd. v. OJC "Novokuznetsky Aluminum Factory", App. No. 01-3348 (3d Cir.) 6

Base Metal Trading, SA v. Russian Aluminum et al., Docket No. 00 Civ. 9627 (JGK) (S.D.N.Y.) 3, 4

CME Media Enters. B. V. v. Zelezny, 2001 U.S. Dist. LEXIS 13888 (S.D.N.Y. 2001) 5

Dardana Ltd. v. Yukos Oil Company, No. 02-Civ.-2517 (S.D.Tex.) 6

Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114 (9th Cir. 2002) 3, 6, 9

In re Fotochrome, Inc., 377 F.Supp. 26 (E.D.N.Y. 1974), *aff'd sub nom, Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975) 3

International Shoe Co. v. Washington,
326 U.S. 310 (1945) 1, 2, 7

Kulko v. California Superior Court,
436 U.S. 84 (1978) 2

Newman-Green, Inc. v. Alfonzo-Larrain et al.,
90 U.S. 826 (1989) 8

Scherk v. Alberto-Culver Co.,
417 U.S. 506 (1974) 3, 9

Seetransport Wiking Trader Schiffarhtgesellschaft MBH & Co. v. Navimpex Centrala Navala,
989 F.2d 572 (2d Cir. 1993) 5, 8

Shaffer v. Heitner,
433 U.S. 186 (1977) 1, 2, 5-9

Wolf v. Richmond County Hosp.,
745 F.2d 904 (4th Cir. 1984) 8

Constitutions:

U.S. Const., Art. IV, § 1 3

Conventions and Treaties:

New York Convention on the Enforcement of Foreign Arbitral Awards 3

Congressional Hearings:

Hearing on the Bank of New York and Russian Money Laundering Before the House Committee on Banking and Financial Services, 106th Cong., 1st Sess. (Sept. 21, 1999) (statement of R. James Woolsey, former Director of the Central Intelligence Agency) 4

Other Authorities:

M. Frike, *Heralded Russian Oil Cargo to US Lands in Legal Mess*, DOW JONES NEWSWIRE, July 18, 2002 6

J. Nisse, *Israelis Probe $630m C&W Sale,* THE INDEPENDENT LONDON, April 8, 2002 4

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Base Metal Trading, Ltd. ("Base Metal") respectfully submits this Reply in support of its March 6, 2002 Petition for a Writ of Certiorari (the "Petition") and in response to the Opposition Brief (hereinafter "Opp.") of Respondent OJSC "Novokuznetsky Aluminum Factory" ("NKAZ").

I.

THE FOURTH CIRCUIT'S RULING CONTRADICTS *SHAFFER V. HEITNER*

NKAZ makes three principal arguments in an attempt to harmonize the decision of the Fourth Circuit with *Shaffer v. Heitner*, 433 U.S. 186 (1977), and thereby convince this Court that the writ should not be granted.

First, NKAZ argues that *Shaffer* holds that presence of property in a district, without more, can never be a sufficient basis for jurisdiction under the "minimum contacts" standard of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (Opp. at 12-13). To the contrary,

> due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

International Shoe, 326 U.S. at 316 (citations omitted). Just months after Justice Marshall authored the majority opinion in *Shaffer*, he explained, in another majority opinion, that "[l]ike any standard that requires a determination of 'reasonableness,' the 'minimum contacts' test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' [*i.e.* minimum contacts] are present." *Kulko v. California Superior Court*, 436 U.S. 84, 92 (1978) (citations omitted). The *Shaffer* Court did not set a minimum threshold number of contacts that are required to satisfy *International Shoe*. To the contrary, *Shaffer* specifically held that where "it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff" the use of property alone to acquire jurisdiction entails "no unfairness in ... an action to realize on that debt ...." *Shaffer*, 433 U.S. at 210, n. 36.

Both *Shaffer*'s result and analysis confirm that the *sine qua non* of fairness and due process under the "minimum contacts" test is the opportunity for a party to defend against the merits of a claim in a forum that has proper *in personam* jurisdiction. *Shaffer* struck down Delaware's sequestration statute because it violated the due process rights of non-resident officers and directors of a corporation by allowing sequestration of their stock, located in Delaware, to establish jurisdiction to *litigate the merits* of their alleged liability in a shareholders' derivative suit. *Shaffer*, 433 U.S. at 212.

Consequently, the Fourth Circuit misapplied *Shaffer* when it mechanically held that a "single shipment" of aluminum was insufficient to confer jurisdiction under the minimum contacts test. (8a - 9a). A single contact – *e.g.* property present in the jurisdiction – can constitute sufficient "minimum contacts" where a party seeks to satisfy or secure

a valid adjudicated debt. To hold otherwise would merely encourage the evasion of valid, legal obligations.[1]

Second, NKAZ alternatively argues that the presence of property, without more, only satisfies the minimum contacts requirement when the court seeks to secure or satisfy a state court judgment "that would be entitled to full faith and credit" (Opp. at 14) and that an arbitration award does not have the "same status as a court judgment [or] binding effect." *Id.* However, NKAZ cites only to cases involving *domestic* arbitrations and ignores the caselaw interpreting the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards (the "Convention"), which affords lawful foreign arbitration awards full faith and credit under Art. IV, § 1 of the United States Constitution as if they were judgments. *See In re Fotochrome, Inc.*, 377 F.Supp. 26, 30 (E.D.N.Y. 1974) *aff'd sub nom, Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975); *see also Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1120 (9th Cir. 2002) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)).

Third, NKAZ argues that various potential challenges to the arbitration award under the Convention somehow

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[1] NKAZ goes as far as to suggest that the arrest of the aluminum in this case was inappropriate because there "is no evidence that NKAZ was seeking to move its property to Maryland in order to avoid its obligations in Russia...." (Opp at fn. 6). Beyond the fact that allegations to this effect were raised in the district court, but Base Metal was denied discovery (*see* Joint Appendix below at 83-84 *and* 27a – 28a), these allegations are also raised in a civil RICO action encaptioned, *Base Metal Trading, SA v. Russian Aluminum et al.*, Docket No. 00 Civ. 9627 (JGK) (S.D.N.Y.).

render the hearing of the issues raised in this Petition to be unfair and inappropriate (Opp. at 16-17). However, these purported challenges are merely "defenses" to the enforcement of arbitral awards that are set forth in Article V of the Convention, which would not be determined until after the district court takes jurisdiction. Therefore, these issues are no bar to this Petition and would more properly be adjudicated by the district court only after the jurisdictional issue is decided.[2]

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[2] NKAZ's argument that Base Metal engaged in wrongful conduct rings particularly hollow, given that the principals associated with NKAZ, *i.e.* Gregory Louchanski and Mikhail Chernoi, have been convicted or indicted in connection with money laundering and embezzlement. *See Hearing on the Bank of New York and Russian Money Laundering Before the House Committee on Banking and Financial Services*, 106th Cong., 1st Sess. (Sept. 21, 1999) (statement of R. James Woolsey, former Director of the Central Intelligence Agency) ("I agreed with my successor, Mr. Deutch's public statement during his tenure that one of the groups involved with organized crime in Russia was Mr. Louchansky and his company, Nordex."); J. Nisse, *Israelis Probe $630m C&W Sale,* THE INDEPENDENT LONDON, April 8, 2002 (describing money laundering probes involving Chernoi in Russia, Switzerland and the US). Furthermore, NKAZ's suggestion that Base Metal should enforce its award in Russia is, at best, disingenuous, given its knowledge that Base Metal has alleged, in an action entitled *Base Metal Trading, SA v. Russian Aluminum, et al.*, Docket No. 00 Civ. 9627 (JGK) (S.D.N.Y.), that NKAZ's now principals have engaged in murder, extortion, racketeering, and the institution of a corrupted Russian court proceedings specifically to defraud legitimate creditors, including Base Metal, making Russia an unsuitable forum.

II.

A CONFLICT AMONG THE CIRCUITS ON THE PROPER INTERPRETATION OF *SHAFFER V. HEITNER* EXISTS AND MAY DEEPEN

Despite the clarity of the logic and language of *Shaffer*, two Circuit Courts of Appeal have disagreed on the scope of its holding.[3] The Fourth Circuit rejected the concept

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[3] Contrary to NKAZ's argument, *Seetransport Wiking Trader Schiffarhtgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 989 F.2d 572, 580 (2d Cir. 1993) did not hold that the presence of property alone in a district cannot satisfy the minimum contacts test. Rather, the Court found jurisdiction in that case. NKAZ's reliance on *American Construction Mach. & Equip. Corp. v. Mechanised Construction of Pakistan*, 1986 U.S. Dist. LEXIS 28551 (S.D.N.Y., Mar. 6, 1996), is similarly misplaced. *See* Opp. at 20. When the passage quoted by NKAZ is read in context, *American Construction* must be read as either supporting Base Metal's position or adopting a third possible interpretation of *Shaffer*, which would cause even more confusion, if it were ever adopted by a Circuit court. The *American Construction* court upheld the use of attachment jurisdiction for the purpose of enforcing a Swiss arbitration award and stated that "the *Shaffer* decision hinged on the jurisdictional issue of property within the district, and concerned the enforceability of a domestic state judgment, and may not be applicable to the other forms of 'minimum contacts' or to enforcement of an arbitral award based on treaty." *Id.* at *14-15 (*quoting Shaffer* at 210-11, n.36). The only other case in the Second Circuit addressing this issue, *CME Media Enters. B. V. v. Zelezny*, 2001 U.S. Dist. LEXIS 13888 (S.D. N.Y. 2001), held that property was a sufficient basis to exercise jurisdiction to confirm and enforce a foreign arbitration award.

of jurisdiction by attachment when it held that a "single shipment does not amount to 'continuous and systematic' contacts" sufficient to allow the district court to take jurisdiction. (8a - 9a). In *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002), the Ninth Circuit held, on first impression, that *Shaffer* was "strong authority" for Glencore Grain's position that "it [could] enforce the award against Shivnath Rai's property in the forum even if that property has no relationship to the underlying controversy between the parties." *Id.* at 1127.[4]

The status of this issue in the Circuits is clearly evolving, and on August 15, 2002 the Third Circuit will hear oral argument on the precise issue under *Shaffer* presented here in the matter entitled *Base Metal Trading, Ltd. v. OJC "Novokuznetsky Aluminum Factory"*, App. No. 01-3348 (3d Cir.), which concerns the arrest of a different shipment of aluminum by Base Metal, in an action in which the district court again dismissed for lack of jurisdiction. Additionally, this precise legal issue may arise in the Fifth Circuit if Yukos, one of Russia's largest oil companies, contests an attachment order against an oil shipment, based on a foreign arbitration award that was recently entered in *Dardana Ltd. v. Yukos Oil Company*, No. 02-Civ.-2517 (S.D.Tex.). *See* M. Frike, *Heralded Russian Oil Cargo to US Lands in Legal Mess*, DOW JONES NEWSWIRE, July 18, 2002. The need for this Court to decide this jurisdictional issue and provide instruction to the lower courts is compelling.

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[4] Glencore Grain was unable to benefit from this holding of law and enforce its award because no property of the debtor could be found within the district. *Id.* at 1128.

III.

THE ISSUE PRESENTED BY THIS PETITION IS RIPE FOR REVIEW ON ASSUMED FACTS TO ALLOW THIS COURT TO PASS ON AN IMPORTANT ISSUE OF PUBLIC POLICY AND INTERNATIONAL LAW

NKAZ' offers several purportedly "compelling reasons" why the Petition is somehow not ripe for review. (Opp. at 20-23). However, none of these reasons are valid; nor do they alter the fact that the Petition presents an important question of public and international policy that can be decided solely as an issue of law.

First, NKAZ argues that the Court should not take this Petition because Base Metal did not raise its argument regarding attachment jurisdiction under *Shaffer* below. (Opp. at 20-21). This is simply not true. The Fourth Circuit expressly considered Base Metal's property-based argument despite NKAZ's objection that it was a "new argument". *See* NKAZ Appellee's Br. at 35 Moreover, the issue of whether Base Metal had established sufficient contracts of NKAZ with Maryland for the district court to invoke jurisdiction under *International Shoe* was the subject of considerable briefing and argument in the district court. This necessarily encompassed evaluation of the aluminum itself as a contact with the jurisdiction because the presence of property at a minimum "might suggest the existence of other ties among the defendant, the State, and the litigation." *Shaffer*, 433 U.S. at 209.

Second, NKAZ argues that this case is moot and Base Metal has no practical remedy because both the aluminum and the escrowed funds were released by the district court. (Opp.

at 21). However, Base Metal would have a cause of action against MG Metal for the value of that aluminum, if the district court took jurisdiction, and Base Metal proved either that the aluminum belonged to NKAZ when it was seized or that it was transferred to MG Metal through a sham transaction merely to avoid creditors of NKAZ. In addition, regardless of whether Base Metal is able to recover against this metal (or its proceeds), it still has an interest in confirming the arbitration award for use in further collection efforts.

Third, NKAZ argues that the Petition raises the jurisdictional question under *Shaffer* on mere "hypothetical facts" (Opp. at 20), and this matter is not ripe for review by the Court, because "there is no longer any alleged NKAZ property within the jurisdiction of the court, and thus no basis for the Court to sustain *quasi in rem* jurisdiction." (Opp. at 20-21). However, NKAZ ignores the fact that the district court, and the Fourth Circuit, rendered their decisions below in the context of a motion to dismiss, which required them to assume the jurisdictional facts as alleged by Base Metal to be true. *Seetransport*, 989 F.2d at 580; *accord Wolf v. Richmond County Hosp.*, 745 F.2d 904, 908 (4th Cir. 1984). Therefore, the district court was correct to merely note the conflict in evidence regarding ownership of the aluminum seized and assume, for the purposes of the motion to dismiss, that the aluminum in question was the property of NKAZ. *See* 27a. This Court should similarly decide this Petition on the record as constituted below, which was properly determined at the time the aluminum was seized. *See Newman-Green, Inc. v. Alfonzo-Larrain et al.*, 90 U.S. 826, 831 (1989) ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed."). Thus viewed, the jurisdictional issue here is solely an issue of law, and it is irrelevant for jurisdictional purposes that the metal

was subsequently released after the case was filed.

Fourth and finally, NKAZ argues that application of attachment jurisdiction under *Shaffer* in the instant case would "seriously interfere with the flow of international commerce." (Opp. 22). This argument is contrary to logic and the assessment by the United States Congress in ratifying the Convention. The United States adopted the Convention to increase the effectiveness of international arbitrations, thereby increasing the stability of international economic transactions, and to promote international trade. *See Glencore Grain*, 284 F.3d at 1120; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). Common sense also suggests that predictability in the enforcement of foreign arbitration awards will increase reliance on them as a favored means of resolving disputes that arise from international transactions – the precise goal of the Convention.

CONCLUSION

For the foregoing reasons those stated in the Petition, a writ of certiorari should be granted.

Respectfully submitted,

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